

**Open Hearing of the
United States House of Representatives
Committee on International Relations
June 22, 2004**

**International Assistance for
Missing and Exploited Children Act of 2004**



September 1995



April 2004

Carina Sylvester

Abducted from the United States to Austria
October 30, 1995

Testimony of
Thomas R. Sylvester
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OPEN HEARING OF THE *UNITED STATES HOUSE OF REPRESENTATIVES*
COMMITTEE ON INTERNATIONAL RELATIONS
INTERNATIONAL ASSISTANCE FOR
MISSING AND EXPLOITED CHILDREN ACT OF 2004
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Biography

Thomas R. Sylvester was born in Covington, Kentucky on September 14, 1953 and is currently 50 years of age. He was raised in Cincinnati, Ohio and graduated from Ohio State University with a BSBA in 1975. He earned his MBA from the University of Cincinnati in 1976.

Mr. Sylvester is a business executive with extensive domestic and international experience in the automotive industry. He has achieved successful results in start-up activities in Asia, South America and Europe. He lived and worked in four countries over a 10-year period while an executive with Chrysler Corporation. He currently resides in Cincinnati, Ohio.

Mr. Sylvester married the former Monika Rossmann in Cincinnati, Ohio on April 4, 1994. His only child Carina Sylvester was born in Royal Oak, Michigan on September 11, 1994. Mr. Sylvester divorced Ms. Sylvester on April 16, 1996.

Mr. Sylvester has testified before the U.S. Senate Committee on Foreign Relations and the U.S. House of Representatives Committee on International Relations regarding international parental child abduction. He addressed the White House Conference on Missing Children on the topic of international parental child abduction. His case has appeared in *Reader's Digest*, on the front page of local newspapers and has been covered in other publications throughout the country. He has been on ABC Nightline and CNN. Since 1999, he has been a volunteer with Team H.O.P.E. (Help Offering Parents Empowerment) to assist families on matters relating to international parental child abduction.

Carina M. Sylvester was born in Royal Oak, Michigan on September 11, 1994. She is now nine years old. Carina had not yet begun to speak at the time of her abduction to Austria by her mother on October 30, 1995. She speaks only German and has lived in Austria with her mother and maternal grandparents since the abduction. Carina has been permitted to spend a few days several times a year with her father in a supervised setting since she was taken from the United States in 1995. She has come to know her father only as an infrequent visitor whose spoken German has declined since his last assignment to a German-speaking country in the early 90s.

Monika M. Sylvester was born in Graz, Austria, as Monika Rossmann on April 29, 1962 and is currently 42 years old. Ms. Sylvester met her husband in 1990 when she was employed as a secretary in Graz, Austria. She married Mr. Sylvester on April 4, 1994 in Ohio. Her only child, Carina, was born in Royal Oak, Michigan on September 11, 1994. On October 30, 1995, Ms. Sylvester abducted Carina from her home in Michigan, taking her to Austria without Mr. Sylvester's knowledge and consent.

Since the abduction, Ms. Sylvester has lived with Carina in Austria. She has been completely successful in derailing the workings of the Hague Convention in Austria. She wields absolute power over the Austrian and American courts, and Carina's life.

CASE SUMMARY

ABDUCTION OF CARINA M. SYLVESTER

Thomas Sylvester married Austrian native Monika Rossmann in Cincinnati, Ohio in 1994. In that year, their only child, Carina, was born in Royal Oak, Michigan. When Carina was just 13 months old, Monika Sylvester abducted Carina from Michigan to Austria. On December 20, 1995, an Austrian trial court found Monika Sylvester to have violated the Hague Convention on the Civil Aspects of International Child Abduction, ordering her to immediately return Carina to Thomas Sylvester in Michigan as follows:

The child's mother, Monika Sylvester, is ordered by otherwise forced action, to return Carina immediately to her father, Thomas Sylvester, in Michigan.... It should be expected from the child's mother, if she puts the well-being of the child higher than her own, that she returns with the child to the United States.

Monika Sylvester refused to comply with the court order and did not voluntarily return Carina. She also ignored an Austrian court order requiring her to provide Thomas Sylvester with visitation with Carina on two occasions at Christmas that year. The Austrian Court of Appeals affirmed the order for Carina's immediate return. The Austrian Supreme Court likewise affirmed the return order stating:

a return of the child to her father would not pose an immediate physical or psychological danger for the child... the goal is to restore the original conditions, until a decision about custody is made by the U.S. courts.

Monika Sylvester ignored the appellate decisions and continued to refuse to comply with the return order. On May 10, 1996, Austrian judicial authorities made their sole attempt to enforce the return order by appearing at Monika Sylvester's house to ask for the child. They were unsuccessful when she denied that Carina was at home at the time.

In Michigan, Thomas Sylvester obtained a Judgment of Divorce on April 16, 1996 granting him sole physical custody of Carina in the U. S. Following the failure of the enforcement attempt in Austria, authorities in Michigan issued an indictment and warrant for Monika Sylvester's arrest for international parental kidnapping on May 29, 1996. Thereafter INTERPOL issued red and yellow notices.

In September 1996, at Monika Sylvester's request, the Austrian trial court agreed to reopen the Hague Convention case due to the passage of time. Although not permitted under the terms of the Hague Convention, an order was entered that the earlier return order would not be enforced and Carina would not be returned to the U.S. This order was based on the best interest of the child standard, stating that the child's best interests superseded the policies of the Hague Convention. That decision was affirmed by the Austrian Supreme Court stating that "*the concrete welfare of the child precedes over the aspired goal of the Hague Convention treaty.*" The Austrian trial court shortly thereafter awarded custody of Carina to the abductor and entered a child support order payable by Thomas Sylvester back to the date of the abduction. The Austrian courts insist that visitation with Carina be in Austria only and supervised by the child's mother for fear that Thomas Sylvester will abduct Carina to the U.S.

The European Court of Human Rights released its decision in the case of *Sylvester v. Republic of Austria* on April 24, 2003. The European Court determined that the Republic of Austria violated the human rights of both the father and daughter when it failed to enforce an order entered by the Austrian courts that Carina be returned to the United States under the Hague Convention on the Civil Aspects of International Child Abduction in December 1995. The European Court of Human Rights, the enforcement arm for the Convention for the Protection of Human Rights and Fundamental Freedoms in Europe, held that Austria had violated Mr. Sylvester's and Carina's fundamental right to a private family life by its failure to enforce the final Hague Convention return order. The decision of the seven-judge panel was unanimous.

Carina is now nine years old. She has lived in Graz, Austria for eight of those nine years, despite orders from both the U.S. and Austria that she be returned here. Monika Sylvester has been completely successful in derailing the workings of the Hague Convention in Austria. She wields absolute power over the Austrian and American courts, and Carina's life. Thomas Sylvester has seen Carina only occasionally under strict supervision since 1995.

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON INTERNATIONAL RELATIONS

OPEN HEARING ON THE INTERNATIONAL ASSISTANCE
FOR MISSING AND EXPLOITED CHILDREN ACT OF 2004

Testimony of Thomas R. Sylvester

June 22, 2004

INTRODUCTION

I am Tom Sylvester, father of Carina Sylvester, my American-born daughter and only child, who was abducted by her Austrian mother from Michigan to Austria on October 30, 1995. That was her last day on American soil. She was then just 13 months old. She will soon celebrate her tenth birthday in Austria. In the intervening nine years, I have worked unceasingly to obtain the enforcement of the various U.S. and Austrian court orders granted in favor of Carina's return to the U.S. in 1995 and 1996. Unfortunately not one of the hundreds of people I have contacted and nothing they or I have done has made a difference. I spoke similar words to this Committee five years ago and the situation today is the same.

As requested by the Committee, my testimony describes the international child abduction of my daughter Carina, from the United States, and her wrongful retention in Austria to this day. My story also illustrates the unending misconduct of the Republic of Austria as well as the inadequate and often ineffective performance of the Department of State experienced by many left-behind American parents. I urge you to take an institutional, remedial, big picture approach that uses my particular case as an example of much larger problems with other countries and within our own government. In that regard, I request that you review the Recommendations section at the end of my full written testimony. While my specific suggestions for amendments to this bill and subsequent legislation in the Recommendations section of my testimony are not complete or guaranteed solutions to every current or future international child abduction or wrongful retention case, they are remedial measures that will make an immediate difference in many cases. They are the right thing to do in the memory of the thousands of abducted American children who never have come home. If just one American child is saved, the legislative measures I propose will be worth it.

For me, the Hague Convention has failed in both of its objects set out in Article 1: to obtain the prompt return of abducted children to their countries of habitual residence and to obtain access to abducted children when access is otherwise being denied. I placed my trust in the Hague Convention and the judicial system that implements it. I relied on the Hague Convention and the workings of the courts both here and in Austria to achieve these objects to both Carina's and my detriment. That was a mistake.

I sit here before you nearly nine years after my daughter's abduction, a person who did everything right under the Hague Convention, including getting all the right orders both here and in Austria, a person who nonetheless has lost his daughter. As to the prompt return of abducted children, the facts are that despite Austria's valid and final order in 1995 for the return of Carina to Michigan for a custody determination there, affirmed through the Austrian Supreme Court, Carina was never returned. The Austrian legal system provides no mechanism for civil enforcement of their orders rendering this and all of their orders useless pieces of paper. Carina's mother was never compelled to

return her and she has not voluntarily done so. With the passage of time, the Austrian Court re-opened the Hague Convention case, an action not sanctioned by the Hague Convention, ruling that it was in Carina's best interests that the return order not be enforced and that Carina was now to stay in Austria. The Supreme Court of Austria affirmed and the case was then closed. Oddly, unlike the return order, the order that the return order would not be enforced and the child not returned is well-respected and honored in Austria. The Austrian court thereafter proceeded to award Carina's mother custody of Carina in violation of Article 16 of the Hague Convention and further ordered me to pay child support retroactive to the very day of the abduction.

After more than eight years of continual activity to rectify this situation through legal channels, working exclusively through the system devised under the Hague Convention, I can say today that there has been absolutely nothing that has been done that has made any difference whatsoever to correct this situation. Unbelievably, it is not the law, the Austrian government and their courts, or the U.S. government and our courts who is in control of the situation. It is the abductor who is in complete control. This is a case of the Hague Convention at its absolute worst.

I greatly appreciate the invitation to address you today. I hope that hearing my story will help you understand the need for continual improvement in our work as a treaty partner to the Hague Convention. Despite our excellent return rate under the terms of the Hague Convention, there is always room for improvement.

It is the notion of reciprocity which forms the foundation upon which the Convention is built. If we expect to receive the benefit of the return of American children by other countries, we must strive to reciprocate. In turn, when those countries benefit from the excellent system in operation here under the Hague Convention, we must hold them to a high standard as well.

I pray that in working to perfect our system, we may inspire those like Austria to do the same.

My Experience

There are no words to adequately describe my feelings of loss and pain. I wish that I could convey the daily anguish and the deeper feelings of sorrow, sadness, anger, despair and hurt. These feelings are always present for me. The moment I became aware that my daughter was taken from me, I felt like someone had reached inside my chest and ripped my heart out of my body. Since then, I think about her always. Every child I see reminds me of her. There is not a day that goes by that she is not paramount on my mind. Through Carina, I felt the joy and wonder of being a father. Then, after only 13 months, I felt the sorrow of her being taken away from me. If you are a parent yourself, perhaps you can imagine the heartbreak of being without your child.

I believe that I am doing all that I can and feel that some days I devote most of my time to obtaining some assistance in having a life with my daughter. I have sought this assistance from only those persons I believe to be holding themselves out in the United States government as those who can help--the Department of State and the Department of Justice and even the President of the United States.

Despite my unceasing efforts to be a substantial part of Carina's life, I play only a small role in her life. We speak on the phone once a week for about 10 or 15 minutes. These calls are monitored by speaker-phone by Carina's Austrian family. Our conversations are also limited by the fact that Carina speaks only German. Under these conditions, it is often difficult for us to express our feelings adequately. I send her a card with a small gift every week so she has something tangible to show that I love her. I am not permitted to know where she goes to school, or see her report cards. She is very active in school activities, plays, music, and sports, however, I have never been able to attend any of these events and cheer for her. I have just spent my ninth Father's Day apart from my daughter.

Carina and I do not have the opportunity to relate to each other as father and daughter on the most fundamental human levels. I cannot support and mentor Carina in her day to day life. Since Carina was taken, I have never had the opportunity to read her a bedtime story, kiss her goodnight,

help her with her homework, or teach her to play baseball. I have not been permitted to take her to church, or share family values with her. On all of the holidays that most families take "togetherness" for granted, I am never able to be with my daughter. Aside from all of the legal and political issues surrounding my situation, these are the most important.

The financial reality of the situation is that I have paid legal fees, travel and related expenses both here and in Austria of nearly \$500,000. There is no end in sight to these expenses. This is money that I pay for Austria's non-compliance with the Hague Convention, their adjudicated violation of my and my daughter's human rights, and their inability to enforce their own orders. It saddens me that these funds could otherwise have been used for Carina's future.

I love Carina, my precious nine year old daughter, with all of my heart and soul. Carina is my only child. I will continue my efforts on all levels; practical, emotional, and spiritual, to provide her the opportunity to feel love and be loved by both of her parents. I am committed to a loving relationship with my daughter.

Procedural Background

The Hague Convention Case, Article 3:

On October 31, 1995 I filed an Application for Assistance with the State Department under the Hague Convention, to which both the U.S. and Austria are party. I also filed a Complaint for Divorce in Oakland County Michigan Circuit Court. The Application for Assistance made its way through the Austrian Ministry of Justice to the court of the first instance in Graz, Austria where hearings were conducted by Judge Christine Katter. Both Carina's mother and I appeared at the hearings, and her mother raised defenses to Carina's return under the terms of the Hague Convention. On December 20, 1995, Judge Katter entered an order for the immediate return of Carina to me in Michigan. In that order Judge Katter stated:

"The child's mother Monika Maria Sylvester is ordered by otherwise forced action to return the minor Carina Maria Sylvester, D.O.B. 09/11/94, immediately to the father Thomas Sylvester to the previous residence in 5851 Cheerywood Drive, Apt. 1912, West Bloomfield, 48322 Michigan USA."

* * *

"Here must be considered, that in the process the custody is not to be decided, but that the condition prior to the kidnapping restored, and that the State of the prior residency can resolve the custody decision."

* * *

"It should also be expected from the child's mother, if she puts the well-being of the child higher than her own, that she returns with the child to the United States."

Carina's mother, however, did not comply with the return order.

Judge Katter also ordered specific supervised visitation for me at the Institute of Family Learning in Graz, Austria on Christmas Eve and December 27, 1995. Carina's mother did not bring Carina to the appointed place for visitation on either date denying Carina the opportunity to share the fun of opening Christmas presents with her father. That was the first of many Christmases we have now spent apart.

Instead, Carina's mother took an appeal to the return to the Austrian Court of Appeals. This initiated an automatic stay of enforcement of the return order which ultimately continued through May 7, 1996. The Austrian Court of Appeals affirmed the return order and again directed Carina's mother to return her to me for a custody determination here in the United States stating:

"It is the mother's freedom and is also expected of her as a responsible custody provider, that she put the welfare of the child before her interest to stay in Austria and returns together with the daughter to the United States. It is then the responsibility of the appropriate American court to decide final custody."

Rather than returning Carina at that point, Carina's mother instead took an Extraordinary Writ to the Austrian Supreme Court. That court, although rendering its decision on February 27, 1996 in favor of the return of the child, did not "deliver" its order until May 7, 1996. The Supreme Court order stated:

"According to the findings of the lower courts, which are binding for the Supreme Court, a return of the child to her father would not pose an immediate physical or psychological danger for the child. Furthermore, the appeal emphasizes problems for the child due to a separation from her mother, the main provider, if she complies with the order, is not given. The goal is to restore the original conditions until a decision about custody is made in the United States."

Once the decision of the Austrian Supreme Court was delivered, all stays were then lifted in the case and the return order of December 20, 1995 became valid and final. On May 10, 1996, my local attorney assembled a group in Graz, Austria at the direction of Judge Katter to assist in effectuating the one and only opportunity for court enforcement of the return order. That group included local police, Judge Katter herself, an enforcer from the Court and others, including my Michigan counsel and me. Unfortunately, the attempt failed when Carina's mother stated that Carina was not at home and that she was with her grandmother somewhere "in the mountains." I believe that Carina's grandmother escaped from the house with Carina out a back window.

There was much drama in the attempted enforcement in that a gun was drawn by the child's Austrian grandfather on the court officials. However, the local police on the scene made no arrests. To date, despite efforts by my Austrian counsel, there has been no criminal matter against Carina's mother lodged by Austrian officials.

In response to this exclusive chance for court enforcement, Carina's mother admitted herself into a hospital for "injuries" allegedly sustained from her contact with court-appointed officials. She then retaliated with a barrage of actions against the trial court, including a motion for disqualification of the judge alleging an amorous connection between the judge and my Austrian counsel, and a motion to change venue based on a false change in her address, both of which were denied. She then lodged criminal charges and grievances against my attorney.

The most damaging of all, however, was her petition not to enforce the Hague Convention return order due to change of circumstances resulting from the passage of time. This motion was denied by the trial court, but was reversed and remanded on appeal. The Supreme Court of Austria determined that the order to return, entered more than a year earlier, could not itself be changed since it was both valid and final. However, with the services of an "expert" in child psychology, the trial court was to determine if circumstances had changed sufficiently due to the passage of time to warrant that

the child not now be separated from her mother under the "grave risk of harm" analysis under Article 13(b). The trial court was further to consider if the child were to be returned, the proper mode for enforcement of the order.

On remand, the trial court held that the order for return would not be enforced and the child would stay in Austria. This decision was allegedly based on the report of the Austrian "expert" child psychologist on a best interests of the child standard "*since the specific welfare of the child takes precedence over the purposes of the Hague Convention.*"

I myself was never interviewed by the child psychologist prior to this determination and it was therefore made without benefit of any information or experience other than that provided by the abductor herself. I did however at that time provide the Austrian court with a copy of a "Safe Harbor" order from the Michigan court, the scheme of which the Austrian court dismissed as not in the Carina's best interest since it would remove her from Austria and could allow for the possibility my retaining custody of her in Michigan. Both situations, the court concluded, would be detrimental to the child. With this analysis, the court effectively determined custody in clear violation of Article 16 of the Convention. This decision was subsequently affirmed by the Austrian Supreme Court. The Central Authority in Austria notified us shortly thereafter that it had closed their file on the abduction.

The Michigan Divorce Case

In Michigan, the divorce case proceeded to a Default Judgment of Divorce granting me sole physical and legal custody of Carina. Carina's mother appeared in and participated in the case to the extent of requesting that the default entered be set aside. Following an extensive hearing, the Michigan court determined that it would set aside the default on the condition that Carina's mother return her to Michigan by a date and time certain. Carina was not returned. The Judgment of Divorce was entered on April 16, 1996. One week later, the court entered an order sealing the court records.

My attempts to obtain acknowledgment by Austria of the Michigan Judgment of Divorce have been unsuccessful to date. In fact, after three years in the various stages of appeal, the matter has not been finally determined. Initially, the Austrian Ministry of Justice denied my request for acknowledgment of the Michigan Judgment of Divorce. This decision was affirmed on appeal. While my further appeal was pending before the Supreme Administrative Court, the issue of the proper Austrian body to determine the recognition of foreign judgments was presented to Austria's Constitutional Court. This Constitutional review has stayed consideration of my appeal to the Supreme Administrative Court. It is unknown when the Constitutional Court will decide the question. Irrespective of that decision, it will be years before a final determination of Austria's recognition of the Michigan Judgment of Divorce from April 1996 will be made..

This delay in recognition of the Michigan judgment combined with the Austrian Supreme Court's order not to enforce the valid and final return order justified the Austrian trial court to determine itself vested with jurisdiction to award custody of Carina to her mother and to order me to pay child support retroactive to the day of the abduction. My appeals on both issues were denied. With the implementation of the Uniform Interstate Family Support Act here in the States, I could expect that the Austrian support order, when presented to the appropriate state agency, would be honored automatically and my income withheld, thereby violating the Michigan Judgment of Divorce and subsidizing the abductor in the process. Fortunately, HUD recently issued a statement giving local agencies discretion on the mandates of automatic enforcement of foreign support orders in international parental child abduction cases. It has become necessary for me to notify my local support enforcement agency, provide it with a copy of the HUD statement and copies of both the 1996 Michigan Judgment of Divorce granting me custody and the 1999 Austrian support order which conflicts with it. With this, I have had some measure of success in confirming that automatic enforcement of the Austrian support order will not take place.

The Hague Case, Article 21

In March 1998 when Austria closed its file on my Article 3 case, I petitioned under Article 21 for access to my daughter for visits in July, September and December of that year. The petition was presented to the trial court, by that time presided over by the new judge.

Unbelievably, the petition under Article 21 was denied in April 1998 on the grounds that the Hague Convention did not apply. In May, the Austrian Court of Appeals reversed and remanded the decision, directing the trial judge to enter an order for access as "guaranteed under Article 21." At the end of July, the new trial judge did just that, ordering visitation in Austria at the home of Carina's grandparents where she and her mother lived. Since the July dates had already passed, the order granted the request for only the September and December dates. Carina's mother appealed that decision based on the fact that the court had not secured approval for the visit from the grandparents and therefore, had no authority to order the visit in their home. It was also based on Carina's mother's articulated fear that I would still snatch Carina back, even after four years of not having done so. In addition, she claimed that seeing me would traumatize Carina and believed that I should have no visiting rights because a warrant existed in the States for her arrest. I appealed supervision of the visits. By the time the first appeal was heard, the September dates had passed and the issue was moot as to that visit. Because of the passage of time, the court also recommended that I give a new schedule of dates. The opinion of the child psychologist would be required to determine how I have accepted the current situation and how I see Carina's future in order to determine whether it would be in Carina's best interest to have access to her father. I took a further appeal to the matter, particularly related to the use of the "expert" evaluation for the propriety of the visit. The Supreme Court affirmed.

I consequently was required to travel to Austria to meet with the "expert" child psychologist. My requests of the court to see my daughter at that time while I was in Austria were denied. I therefore took it upon myself to stand outside of her house with arm loads of presents, begging to see her. Carina's mother responded and I spent the entire day with Carina, her mother and grandparents at their home. This contact resulted in what might be called a discussion but which is more appropriately called an ultimatum. Carina's mother, understanding her absolute power in this matter has outlined her demands for allowing me to have a life with my daughter:

1. Written acceptance of Austrian custody court order;
2. Written acceptance of Austrian child support order;
3. Payment of remainder of the arrearage owed on the Austrian child support order retroactive to November 1995;
4. Withdrawal of American warrant of arrest; and
5. Agreement to the entry of an Austrian judgment of divorce.

Should I do all five of the above, Carina's mother will then consider allowing me some periodic visitation, decided one visit at a time and always to be had in her presence in Austria. Under no circumstances will she allow Carina to return to the U.S.

She is right to know that she is in control because there can be no question that she is. Even if I could obtain an access order from the Austrian court, without enforcement mechanisms, Carina's mother may comply or not as she chooses. The history is that she will not comply. Under Austrian law, there will be no sanctions for her doing so.

As a result, although Article 21 was clearly designed to protect me from these situations – I am left with the reality that I must engage in self-help if I am ever to know my daughter. Self-help however, was the device that the Convention was designed to remedy so as to afford parents like me

the weight of the law and the support of the local courts in seeking the return of abducted children. In the end, the Convention and its implementation by Austria combined with a lackluster showing of support from the U.S., has led me inexorably to self-help on access. Had I known all of this at the start, I would have engaged in self-help in 1995 when the abduction occurred and avoided the legal, emotional and financial disaster this matter has become. Had I done that Carina would now know both her mother and her father.

In the nearly nine years since Carina's abduction from the United States to Austria on October 30, 1995 at age 13 months, I have been permitted to see her on only 57 days, only at times approved by the abductor, and always supervised by the abductor and others. The chart below summarizes the amount of access time by year:

Dates	Number of Days
October 30, 1995 – December 31, 1995	0
Year 1996	0
Year 1997	6 days (one hour each day)
Year 1998	0
Year 1999	4 days (10 hours each)
Year 2000	11 days (10 hours each)
Year 2001	6 days (1 day, for 3 hours, 5 days, 9 hours each)
Year 2002	15 days (5 days, 6 hours each, 10 days, 9 hours each)
Year 2003	12 days (4 days, 6 hours each, 8 days, 9 hours each)
Year 2004 to date	3 days (1 day, for 6 hours, 2 days, 9 hours each)

The Criminal Case

In addition to my efforts under the Hague Convention, I sought a criminal warrant against the abductor under the International Parental Kidnapping Act. Special Agent Scott Wilson of the FBI took the information and obtained the warrant on May 29, 1996. Interpol issued red and yellow notices. The case was assigned to Assistant U.S. Attorney Jennifer Gorland. To my knowledge, no action was taken on the warrant or the complaint for the first two years. My request to Jennifer Gorland that an extradition request be made to Austria for Carina's mother was denied by Ms. Gorland on the grounds that Austria does not extradite its own nationals. Just recently I learned a provisional arrest request was presented to Italy a short time ago. The request was denied by Italy.

Sylvester v. Austria: The European Court of Human Rights

First and Second Complaints

In the late 1990s, I filed a total of three Complaints against Austria on behalf of my daughter and myself with the European Court of Human Rights (ECHR) in Strasbourg, France. The ECHR is the enforcement arm within the Council of Europe for the European Convention of Human Rights. Austria, a Council of Europe nation, is a party to both the European Convention of Human Rights and the Hague Convention. In 2002, I received news that our first two Complaints had been consolidated and admitted for consideration by the court. Those Complaints alleged a violation of Article 8 of the European Convention of Human Rights by Austria for its unreasonable interference with my daughter's and my right to a family life together by its failure to enforce the order of its own courts for Carina's return to the United States.

On April 24, 2003, a seven judge panel by unanimous decision found Austria in violation of Article 8, awarding me EUR 42,682 in money damages, fees and costs payable by the Republic of Austria. No damages were awarded to Carina.

In reaching its decision, the ECHR applied the all reasonable measures standard, concluding at paragraph 72 of the opinion "that the Austrian authorities failed to take, without delay, all measures that could reasonably be expected to enforce the return order, and thereby breached the applicant's right to respect for their family life as, guaranteed by Article 8."

Although the decision itself was unanimous, the award of damages was the result of a 4-3 split, with two spirited dissents as to damages. The first was a joint dissent as to damages amount, generally declaiming the amount awarded "reparation at its most frugal." The opinion further objected that no award was made to Carina, whom they claimed, should have received "compensation reflecting the level of damage she sustained." The second dissent as to damages was written separately by Judge Bonello to voice his "radical disagreement" with the damages award which he called "mean and beggarly," "paltry and uncaring," and "an offensive trifle." He concluded "if neutralizing the Convention comes so cheap, states may well find it foolish not to brave a try."

The case, styled *Sylvester v. Austria*, has now moved into the execution phase supervised by a Committee of Ministers of the Council of Europe. Austria has met its first burden in that arena with the payment to me of the modest money damages. It must now take both individual and general remedial measures to assure the Committee that the violation of our human rights does not continue and that as a general matter, such human rights violation will not happen again. The Committee meets regularly, approximately every two months, to discuss my matter and many others. It has been reviewing my case for satisfaction since the fall of 2003. Once the Committee is satisfied that both remedies are satisfied by Austria, the case is officially closed.

Unfortunately, the Committee of Ministers has been informed by Austria that since I do not now have a petition under Article 21 of the Hague Convention for access to my daughter pending in the Austrian courts, I therefore have an "agreement" with the abductor as to access to Carina. The Austrians and Committee now take the position that as a result, the violation of my and my daughter's human rights does not continue because I purportedly choose to see my daughter only three times a year, only in Austria, and only under the strict supervision and control of her mother. Further, as to general measures to assure that the violation under Article 8 will not occur again due to their failure to take all reasonable measures to promptly enforce return orders entered under the Hague Convention, the Austrians have submitted new legislation reducing the number of judges competent in the country to hear Hague Convention cases. Effectively, the reduction of the number of courts competent to hear Hague Convention cases bears no direct relationship to whether return orders, once entered under the Hague Convention, can or will be enforced.

It now falls upon me to convince the Committee both that I do not have an "agreement" with the abductor to supervise the limited moments she permits me to have with my daughter and that since Austrian courts are not vested with contempt of court powers to compel compliance with a return orders entered under the Hague Convention, it cannot ever compel compliance with a Hague Convention return order and therefore may indeed again fail to take all reasonable measures as now required under *Sylvester v Austria*.

It is here at which I am at a distinct disadvantage. Austria sends a delegate to the Committee of Ministers at the Council of Europe on a regular basis concerning this and the many other Austrian cases the Committee reviews during their execution phase. As an individual American citizen, I have no delegate and no reasonable means to travel to France every other month to discuss these matters directly with the Committee. As a result, at the beginning of 2004, I sought the assistance of the U.S. government which holds observer status with the Council of Europe. I asked the State Department first to confirm directly to the Committee its long-term and continuing diplomatic efforts to improve my access to my daughter, and second to support my position as U.S. Central Authority under the Hague Convention that reducing the number of courts competent to hear Hague Convention cases bears no direct or even indirect relationship to the ability of those courts to compel compliance with a return order.

Since January 2004, the Committee of Ministers has conducted three meetings with the Austrian delegate concerning my matter. Since January 2004, I have requested the Department of State to assist by doing as the Committee itself suggested, by presenting any information it may have to them directly. Nevertheless, as of the writing of this testimony, I have not been given assurances from the State Department that this will be done. However, just days before this hearing, I learned that the State Department had received clearance for some undisclosed level of participation within the Committee of Ministers. It is my sincere hope that this timing is coincidental and not related to the possibility of my complaint to this Committee concerning the difficulties I have faced in this regard.

Third Complaint

The Third Complaint I filed with the ECHR against Austria was on my own behalf alone for Austria's violation of Article 6 of the European Convention on Human Rights for taking more than six years' time to determine whether they would recognize the custody provisions of the Michigan Judgment of Divorce entered in April 1996. The Complaint was admitted for consideration and all submissions have now been made to the court. A decision is expected before the end of the year.

Diplomatic And Political Pursuits

There has been considerable diplomatic intervention in my case, but without effective follow up actions and results. Despite the efforts of senior level government officials including Ambassador Harty, U.S. Ambassadors to Austria, Secretaries of State Albright and Powell, and even the President of the United States, George W. Bush; no one yet has been able to make a difference.

In an attempt to move the Austrian authorities to assist in either the civil or criminal enforcement of the return order, I sought the assistance of the American Consulate in Vienna. The U.S. Ambassador personally delivered a U.S. government demarche to the Austrian Ministry of Foreign Affairs in June, 1997. I asked the State Department, Bureau of Consular Affairs to correspond with the Ministry of Justice, the Central Authority in Austria. In response, the Austrian Minister of Justice has consistently and stubbornly declined to assist in the enforcement of the Hague Convention or cooperate to facilitate any solution.

Additionally, I requested the involvement of literally hundreds of people including: former President Clinton, former First Lady, Hillary Clinton, Former Attorney General Janet Reno, Former Secretary of State Madeleine Albright; Senators Abraham, Levin, DeWine and Voinovich; Representatives Chabot, Knollenberg and Portman; several representatives within the International Division, National Center for Missing and Exploited Children; the Deputy Assistant Secretary of State for Overseas Citizens Services, U.S. Department of State; a number of individuals within the Office of International Affairs, U.S. Department of Justice, Assistant U.S. Attorney for the Eastern District of Michigan, U.S. Department of Justice; Special Agents, at the Federal Bureau of Investigation, in the U.S. Department of Justice; many individuals at the Bureau of Consular Affairs, Office of Children's Issues, U.S. Department of State; Interpol agents; Consul Generals U.S. Embassy in Vienna; and two former as well as the incumbent U.S. Ambassador to Austria in Vienna.

In addition, I had regular correspondence with various members of Congress. Several of the Congressmen showed their support and wrote letters on my behalf. On October 15, 1998 Congressman Gillman, Chairman of the Committee on International Relations wrote to the Austrian Ambassador to the U.S., Helmut Tuerk:

“Now, Mr. Sylvester is attempting to exercise his rights under the Hague Convention to be able to visit his daughter who just celebrated her fourth birthday last week. (Mr. Sylvester has been able to see the child during her entire life for a total of only six hours.) Again he is encountering delays and obstructions in his legitimate right to visit his daughter instituted by the mother, but aided and abetted by a macabre

procedure in the Austrian judicial system that allows the mother to institute an unending series of appeals in simply establishing a visitation schedule for Mr. Sylvester to see his daughter.”

"You know that I am a good friend of the people and the government of Austria, and I write this appeal to you in that spirit. I urge you to do everything possible to end this miscarriage and travesty of justice so that Mr. Sylvester and his daughter can enjoy the normal relationship that a child is entitled to have her father."

Diplomatic efforts regarding access have been continuing since 1999. A summary of the activity follows:

- | | |
|------------|--|
| 3/02/99 | Department of State Office of Children’s Issues Director and other representatives from the Bureau of Consular Affairs and Office of the Legal Advisor met with officials of Austrian Ministries of Foreign Affairs and Justice in Vienna to discuss the case. |
| 9/13/00 | U.S. Ambassador to Austria Hall, the U.S. Consul General in Vienna, Thomas Sylvester and his U.S. attorney met in Vienna with the Austrian Minister of Justice Boehmdorfer, Ministry of Justice official Schuetz, and counsel for Monika Sylvester in an attempt to mediate access issues. |
| 9/21/00 | Secretary of State Madeleine Albright meets with Tom Sylvester to discuss current problems with access in her Washington D.C. offices accompanied by Rep. Steve Chabot and Mr. Sylvester’s U.S. attorney. |
| 9/25/00 | Secretary of State Albright discussed the Sylvester matter by telephone with Austrian Chancellor Schuessel. |
| 11/08/00 | Secretary Albright and U.S. Ambassador to Austria Hall meet with Austrian Foreign Minister Ferrero-Waldner in Washington D.C. and raise the Sylvester case. |
| 11/26/00 | Secretary Albright met with Austrian Foreign Minister Ferrero-Waldner and Austrian Chancellor Schuessel in Vienna and again raised the Sylvester case. |
| 3/22-28/01 | Department of State sent a delegation to participate in the Fourth Special Commission to review the operation of The Hague Convention on the Civil Aspects of International Child Abduction at The Hague and raised the case with the Austrian delegation. |
| 6/27/02 | Secretary of State Powell meets with Tom Sylvester and Rep. Steve Chabot in his offices in Washington, D.C. to discuss difficulties associated with Mr. Sylvester's access to Carina. |
| 6/28/02 | Secretary Powell contacted Austrian Foreign Minister Ferrero-Waldner, expressing his dissatisfaction with the status quo in the Sylvester case and asking her to help find a solution. |
| 7/01/02 | U.S. Ambassador to Austria Brown met with Austrian Minister of Justice Boehmdorfer to discuss the Sylvester case. Ambassador Brown wrote and hand delivered a letter dated June 10, 2002 noting that the Sylvester case was creating an irritant to otherwise |

outstanding bilateral relations and asking for assistance in reaching a humane and just resolution.

- 1/14/03 Assistant Secretary of State for Consular Affairs Harty met with Austrian Ambassador Moser and discussed the Sylvester case, urging the Austrian government to develop proposals to expand and normalize Tom Sylvester's access to his daughter. Ambassador Moser agreed to ask authorities in Vienna to help develop a workable access plan.
- 3/21/03 Personnel in U.S. Embassy Vienna met with officials of the Austrian Foreign Ministry to discuss the case per instructions from the Department of State to follow up on the meeting in Washington D.C. between Assistant Secretary Harty and Austrian Ambassador Moser. U.S. Consul General in Vienna reviewed all of the efforts made to date to obtain broader effective access rights, especially the right to unsupervised visitation both in Austria and the U.S. and requested concrete suggestions from the Austrian side on how to achieve these goals. Austrian officials promised to look into the case further and provide a response to the U.S. Embassy and Washington.
- 5/02/03 Assistant Secretary Harty approved a diplomatic note to the Austrian Embassy in Washington D.C. forwarding a copy of The European Court of Human Rights' unanimous decision in the case of Sylvester v. Austria, insisting that Austria urgently take steps to expand Thomas Sylvester's access to Carina Sylvester.
- 7/14/03 Assistant Secretary Harty met with Austrian authorities in Vienna to discuss the matter of Carina Sylvester and urged the Austrian government to develop proposals to expand and normalize Thomas Sylvester's access to his daughter.
- 7/16/03 Assistant Secretary of State for European and Eurasian Affairs Jones discussed the Sylvester matter with Austrian Foreign Minister Ferrero-Waldner in Vienna and urged the Austrian government to develop proposals to expand and normalize Thomas Sylvester's access to his daughter.
- 8/20/03 Assistant Secretary Jones raised the case in a meeting with Austrian Ambassador Moser.
- 8/25/03 Under Secretary of State for Political Affairs Grossman raised the Sylvester case in a meeting with Ambassador Moser.
- 9/18/03 Secretary of State Powell raised the case in a meeting with new Austrian Ambassador to the U.S. Nowotny.
- 10/14/03 State Department Legal Advisor Taft raised the case in a meeting with Ambassador Nowotny.
- 10/29/03 Assistant Secretary Jones raised the case in a meeting with Ambassador Nowotny.
- 11/13/03 Under Secretary Grossman raised the case in a meeting with Austrian Foreign Ministry Secretary General Kyrle.

- 12/04/03 President of the United States George W. Bush raised the Sylvester case with new Austrian Ambassador to the United States Nowotny as she presented her credentials.
- 01/16/04 Assistant Secretary Hardy met with Ambassador Nowotny to discuss the case of Carina Sylvester and ways for Thomas Sylvester to expand access to his daughter.
- 01/26/04 U.S. Attorney General Ashcroft raised the Sylvester matter with the Austrian Minister of Justice while in Vienna.

Given all that has taken place with all of the people involved both in Austria and the United States, it is amazing to me that nothing to date has made a difference.

The Media

I have turned to the media for assistance after failing on the legal, diplomatic and political fronts. I would prefer not to pursue this forum. I do not seek or enjoy the personal attention. I do not typically make my private life public. However, I have come to realize that my case is a tragedy that has resulted in spite of the purported safeguards put into place by the Hague Convention and the International Parental Kidnapping Act. Nothing can give me back these nine years without my daughter and no one can give my daughter a childhood filled with memories of her father. However, this situation cannot be allowed to continue and this situation must not happen again. The problems encountered under the Hague Convention by an individual parent are not just private matters.

I believe my case serves as an excellent example of how the system does not work and has failed miserably. I believe that it is important to tell my story so that the American people can have a better understanding of what can happen in these cases, and to caution those who may follow. I was told early on by a representative of the U.S. Embassy in Vienna that it is clear that the Austrians are protecting Carina's Austrian citizenship. In response, I have asked for years who in the States is protecting Carina's American citizenship. I am given no response.

I have attempted to publicly embarrass the Austrians for their handling of this case and validation of the abductor's illegal, deviant behavior. I am outraged by Austria's behavior and my government's ineffective response in this case. My rights as a parent are being denied and the Austrians are denying Carina's rights. Although Austria is our ally and claims to be a civilized society, I am getting the level of cooperation from the Austrians as one might expect to receive from our enemies. I will continue to do all I can to highlight Austria's performance in the media in the hopes that they will cooperate to ensure the objects of the Hague Convention are upheld, end this travesty of justice and continuing violation of human rights.

My efforts on this front have included articles appearing in a number of newspapers and magazines throughout the country including: *The Washington Post*, *The Washington Times*, *International Herald Tribune*, *Chicago Tribune*, *The Cincinnati Enquirer*, *The Cincinnati Post*, *Foreign Service Journal*, and a special feature in the *Reader's Digest*, entitled, "America's Stolen Children." I have also appeared on various radio and television broadcasts including: Voice of America, ABC *Nightline* and CNN.

I am concerned that Austria will not unilaterally and voluntarily reform their system. I believe they will do so only when forced to do so out of self-interest (if their children are not being returned by foreign judges in retaliation) or embarrassment (from massive publicity and adverse human rights reports).

I contacted the media in an effort to raise awareness of my situation and the problem of international child abduction at large. I believe that international child abduction is child abuse. I also believe it is a human rights issue. I need media support. All parents in my situation need media

support. I continue to request assistance and support from the media in order to educate the American public and improve the situation for American left-behind parents and their children.

Networking/Advisory Panels

I have networked extensively with other similarly-situated parents. Networking among left-behind parents and their attorneys is in fact a valuable resource because of the immediacy and wealth of information exchanged. Our federal government should propose ways to facilitate such networking, including requests for Privacy Act waivers from the outset, so that the Department of State and the Department of Justice can give a left-behind parent names and phone numbers of other parents in the same situation with the country in question.

I have attended workshops on the issue of international parental child abduction and participated in rallies in support of active government participation in the return of parentally abducted children. During the past nine years I have actively participated in Parent Focus Groups and have been in contact with a large number of left-behind parents and hundreds of people involved in addressing child abduction. I am a member of many organizations, including: Parent & Abducted Children Together (PACT), Children's Rights Council, Parents and Children for Equality, and the National Fatherhood Initiative.

On October 1, 1998, I testified before the United States Senate Committee on Foreign Relations to examine the U.S. Government's response to international parental child abduction. On October 14, 1999, I testified before the United States House Committee on International Relations to review the implementation of The Hague Convention on the Civil Aspects of International Child Abduction. On February 9, 2002, I participated in meetings with the Congressional Missing and Exploited Children's Caucus on "Bringing Our Children Home," to discuss the plight of internationally abducted children. On October 2, 2002, I addressed the White House Conference on Missing Children on the topic of international parental child abduction.

Since 1999, I have served as an active volunteer for Team H.O.P.E. (Help Offering Parents Empowerment). As a Team H.O.P.E. volunteer, I have assisted 60 parents whose children were internationally abducted or threatened to be internationally abducted.

The United States Central Authority: The Department of State

I have had a direct relationship with the Office of Children's Issues, Bureau of Consular Affairs since 1995. I believe this long-term relationship to be unusual and the result of the fairly unique nature of my personal case. Unlike many other cases, the job wasn't done in six to 18 months. My eight-year relationship with Children's Issues has therefore given me adequate opportunity to form judgments as to the value received by American parents from the Office of Children's Issues when things don't go as expected following the entry of an order by another country that a minor American child be returned to the United States.

I was surprised initially by the vast number of telephone calls and faxes that it took in order to get even a letter sent from Children's Issues to the Austrian Central Authority. As a result, during the late 1990s, a significant amount of my work day, every day, was devoted to follow up phone calls, voice messages and faxes, all at significant expense and all for very minor matters. The sheer volume of the time required for the absolutely necessary repeated and persistent follow-up in the end consumed all the time I had available and meant the loss of my job and concomitant income.

As time passed, I learned that the caseworkers in Children's Issues, their superiors and embassy/consulate staff rotated assignments every two years. As a result, I have had to work with no fewer than six successive caseworkers alone including Charisse Philips, Ellen Conway, Steve Senna, Bill Fleming, Nadine Wick and now Georgiana DeBoer, each for varying degrees of time. The

institutional memory was lost with each departure and I felt that I had to begin the re-education process every year or so, leading to a complete stoppage of forward advancement of my matter.

There was indeed a window period of time throughout most of 1996, after the return order was affirmed by the Austrian Supreme Court in the spring but before the Austrian courts determined that they would not enforce the order in December. It was then that I also looked most hopefully to the Department of Justice to work diligently in pursuing the international warrant for the abductor's arrest. During that period, with tremendous persistence on my part, several written exchanges took place between Children's Issues and the Austrian Central Authority concerning the failure of the Austrian authorities to enforce the return order. The Austrian reply was always that it could do nothing, specifically stating that it could do nothing to locate my daughter, to help in any way because I was represented by an attorney there, or to "interfere" with the "independent judiciary" by way of education or briefing the issue of the necessity of enforcement. For these letters written by Children's Issues, I am grateful, for they have laid the foundation for my moral victory in the ECHR. However, it is impossible for me to enumerate the number of hours logged on the telephone to Children's Issues, my Austrian and American attorneys and others during just that critical period. In the end, however, just writing letters was of course grossly inadequate to get the very difficult job done. In the end, they had no effect whatsoever on my having a life with my daughter and she with me.

These inadequate and difficult to obtain measures taken by Children's Issues are mirrored by the surprising difficulties I had contended with from American Embassy/consulate staff (with the exception of the wonderful services provided by Ambassador Hall and Consulate General Jim Pettit.) In 1996, I had been informed in Austrian court papers that my daughter had been moved from her grandmother's house to a neighboring town. This was done by the abductor to effectuate a procedural change in venue in the case with the hopes of obtaining a new judge on my case in Austria. Troubled as to whether my daughter had actually been moved to somewhere new, I began a quest to obtain a consular visit in the form of a welfare and whereabouts check. This was first requested in June of 1996, and after being rebuffed by the abductor's attorney, could not be obtained from the staff at the American Embassy for a full two and one-half years. Even then, my request that a photo be taken of my daughter, whom I had not seen since October 29, 1995, was denied for fear that I would use the photograph somehow to steal my daughter back to the U.S.

This has for me been an extremely difficult pill to swallow because the failure of the Department of State to provide my daughter and me her right to a consular visit as guaranteed under the Vienna Convention appeared to be the result of strong-arm and intimidation tactics by my ex-wife's new attorney. Her threats to the consulate and steadfast refusals to allow them access to Carina resulted in my own countries' denial of two American citizen's rights to these visits for two and one-half years.

In the intervening five and one-half years, the Office of Children's Issues and their superiors have for the most part written letters and conducted meetings with Austrian government officials who remain unfazed by the gravity and incongruous result of the legal case there. Meeting after meeting has occurred at a rate of approximately three per year. In no such meeting other than one in Vienna in 2000 including Ambassador Hall and Jim Pettit, was I permitted to attend. Moreover, my requests to help prepare the group of new-comers unfamiliar with the case, in advanced of the meeting, has been almost uniformly rejected. My complaints on this front have been met in recent years with some allowance for Children's Issues listening to what information I give them. In all honesty however, I must report that I seldom see any use of that material from meeting to meeting. This I can attribute to the lack of continuity resulting from the frequent turnover in the Department.

For example, beginning in the late 1990s, I became aware that The Austrian Central Authority representative, Dr. Werner Schutz and others in the Austrian government, including Justice Minister Diter Boermdorfer and Foreign Minister Benita Ferarro-Waldner were using four regular "excuses" to justify why discussions cannot go forward for an out-of-court settlement of access. These are, the giving of safeguards and guarantees that if Carina were brought to the United States that she would be

returned, that the existence of the un-pursued warrant for the abductor's arrest must be lifted so that the abductor could accompany Carina to the United States and finally that I must relinquish my Michigan custody order in favor of the orders of the Austrian courts concerning custody, access and support.

Years ago, seeing this pattern develop, I began a campaign to educate Children's Issues and consulate staff of these excuses being given to newcomers, who would not be sufficiently educated to rebut them. The failure to rebut the excuses acted to delay any forward progress in any increased access to my daughter and instead rendered each meeting between an Austrian and U.S. government official not only useless but actually detrimental. This is because rather than being able to advance the discussions toward resolution, the newcomer in effect lost face with the Austrian official, who knew full well the true status of the rebuttals to the excuses.

As a result, my campaign with Children's Issues was the presentation of a "cheat-sheet" of the excuses and the historical facts to rebut them. Nonetheless, the effort has failed completely, because even in the most recent meeting between Attorney General Ashcroft and Minister Boermdoerfer, the guarantees excuse was again raised by the Minister, knowing full well of the guarantees already given him in writing years before.

The "cheat-sheet" provided the following detail of fact.

1) GUARANTEES AND SAFEGUARDS

Austrian Excuse #1: The main obstacle concerning visitation by Carina in the U.S. with her father is the lack of safeguards and guarantees that the child will be returned to her mother in Austria at the end of the access period. (Werner Schuetz, June 19, 2002)

Response to Excuse #1: Guarantees and safeguards ensuring Carina's return from the U.S. after a visit here were provided to the Austrians in 1997, 1999, 2000, and 2002 and were ignored.

A. GUARANTEES:

On July 1, 2002, the Austrian Minister of Justice Boehmdorfer himself wrote of the specific guarantees given by the U.S. government in a letter to Dr. Brinbaum, Monika Sylvester's attorney as follows: *"In case of missing the envisaged and supervised visitation rights (kidnapping) – especially if the child visits the U.S. - the U.S. authorities would agree to guarantee your client the return of her child after the end of the visiting period."*

After receiving a response from Monika Sylvester's attorney, Dr. Boehdorfer reported on August 21, 2002 to the U.S. Ambassador that "Dr. Brinbaum has now responded [to the above letter] by stating that unsupervised access, whether in Austria, or even worse, in the U.S., would be extremely harmful to the child's welfare and would be completely irresponsible. I regret that this attempt at an out of court resolution has not been successful and hope you understand that I will not be in a position to undertake any further steps in this matter."

B. SAFEGUARDS:

These concerns that Carina would not be returned after a U.S. visit were addressed first in 1997 when the Michigan court entered a “Safe Harbor Order” calling, among other things, for the reconsideration of the issue of the custody of the child and the lifting of the warrant for the mother's arrest when she and the child boarded a flight.

This Safe Harbor Order was obtained in the Michigan case on April 23, 1997 and submitted to the Austrian Court which dismissed it in its entirety as being of no consequence.

Nonetheless, when the U.S. Central Authority (USCA) sent a special delegation on March 2, 1999 to Vienna to discuss continuing problems with the Sylvester case, the Austrian Central Authority (ACA) informed them that Safe Harbor Orders should be attempted and obtained "since such orders might give the Austrian judiciary more confidence in returning the abductor and the child to the place of habitual residence." The USCA did not challenge this position based on the obvious falsehood of the ACA's statement in light of the clear facts of the Sylvester case.

Further, following a meeting in Vienna on September 13, 2000 attended by Ambassador Hall, Mr. Sylvester, the Austrian Minister of Justice and others, and specifically in response to requests of the Minister of Justice made at that meeting, Thomas Sylvester submitted a draft motion requesting that the Michigan Court enter a second, more stringent Safe Harbor Order. The submission made was then completely ignored by the Ministry of Justice yielding no result whatsoever. When this was attempted to be presented to the Austrian Court at a hearing in Graz on December 28, 2000, the judge tossed it aside refusing to look at it.

2) WARRANT AND CRIMINAL PROCEEDINGS

Austrian Excuse #2: “There is still a warrant for arrest against the child’s mother in the USA.” (Werner Schuetz, June 19, 2002)

Response to Excuse #2: This concern was addressed in 1997, 1999, 2000 and 2002.

A. BACKGROUND:

International parental child abduction from the United States is a felony offense. There are two victims: the left-behind parent, and more important, the child. The Congress of the United States indicated its dedication to the eradication of international parental child abduction and its expectation to deter such behavior in passing the International Parental Kidnapping Crime Act ("Crime Act"). The Crime Act was not intended specifically to return an abducted child to the United States. Instead, it is intended to deter international parental child abductions and to punish abductors for such behavior.

B. WARRANT FOR ARREST OF MONIKA SYLVESTER:

The warrant for the arrest of Monika Sylvester was sought and obtained on May 29, 1996 only after the failure of the enforcement proceedings in Austria.

C. AUSTRIA'S RESPONSE TO THE WARRANT:

In the Sylvester case in Austria, the court concluded as a matter of policy that so long as a warrant is active against the abductor as to her criminal activity in the U.S., it would not permit the only child of the left-behind parent, that child being a United States citizen, to return to her homeland for any reason whatsoever, since the abductor could be jailed upon her arrival in the States. This policy is universal and complete and extends even so far as refusing to believe the U.S. courts when a Safe Harbor Order is entered mandating a lifting of the warrant pending civil proceedings regarding custody. Because Monika Sylvester has falsely stated to the Austrian court that Tom Sylvester had long ago promised to have the warrant for her arrest lifted and, because he has not done so, he is believed untrustworthy. Thomas Sylvester never made such a promise; nonetheless, this falsehood has been memorialized as fact in the rulings of the Austrian Court.

On July 1, 2002, the Austrian Minister of Justice wrote to Monika Sylvester's attorney, Dr. Birnbaum, **"The U.S. would be willing to withdraw the warrant for your client's arrest."** Her reply on August 21, 2002 stated that "unsupervised access, whether in Austria, or even worse, in the U.S., would be extremely harmful to the child's welfare and would be completely irresponsible". The attorney went on to express her surprise that - "in spite of the universally accepted principle of the separation of powers and the principle of the independent judiciary – the political representative of the governments of the U.S. and Austria would continue to intervene on behalf of the child's father with no regard for the welfare of the child".

The alleged concern in lifting the warrant before Carina's return to the United States is that there is no guarantee from the Austrians that the child will be returned to the United States after the warrant is lifted. All proposals made to lift the warrant immediately upon the return of Carina to the United States have been rejected by the Austrians.

3) CHILD CUSTODY

Austrian Excuse #3: "There is still an order by a United States court granting sole custody to the child's father while in Austria the child's mother has sole custody." (Werner Schuetz, 19 June 2002)

Response to Excuse #3: This concern has been addressed in 2002, 2000 and since 1997.

Both the Austrian court and the Ministry of Justice have demanded that the independent judiciary in Michigan modify its custody to award custody to the mother in

Austria before sufficient trust of the father can be gained to allow consideration of Carina to visit her homeland.

4) ACCESS REQUESTS/ MEASURES TO SECURE ACCESS ARRANGEMENTS

Austrian Excuse #4: “At present no application for access is pending in the competent Austria court. The child’s parents have agreed on two dates in August 2002 and in September 2002 for access.” (Werner Schuetz, 19 June 2002)

Response to Excuse #4: This concern has been addressed repeatedly since 1998.

The Austrian court orders for access are timely, costly, ineffective and not enforceable. The futility of the process of obtaining realistic access to Carina via court orders has been realized for years. The frightful truth is that it took nearly two years to finally obtain a court order under Article 21, from first application. The Austrian Court's initial response was to dismiss the petition under the inexplicable reasoning that the Hague Convention did not apply in the case. On appeal, that unfortunate determination was reversed, however, each time an order for limited and supervised access was entered, Monika Sylvester would appeal, such appeal extending beyond the ordered access dates, rendering the matter moot. In the instances where access was actually ordered, the judge always deferred to the mother’s wishes, ordering access according to her desires rather than considering my request. As a result, the meager access ordered was always just whatever the mother wanted to allow. In every instance also, Mr. Sylvester's requests that Carina return to the United States for a visit have been denied as was his request that a long-term plan be developed to assimilate Carina to having unsupervised time with him in Austria leading to her eventual visits to the United States on a regular basis.

The latest of the meetings to take place was that between Attorney General Ashcroft and Minister Boehmdorfer as referenced above which took place in January 2004. The State Department summary of that meeting demonstrates that Minister Boehmdorfer lied to the Attorney General about safeguards. Since that time, I have been persistent in requesting a written rebuttal from the Department of State, but six months later, I am told by my caseworker that the letter is still in process. The text of the State Department report on the meeting, including the provably false statement that he had received no guarantees, reads as follows:

The Attorney General expressed our great interest in the Sylvester child custody case. [Justice Minister] Boehmdorfer said he understood the U.S. sensitivity. He said there were problems on both sides: the Austrian courts had been slow, and then had used that slowness to keep the child in Austria. This was not acceptable, Boehmdorfer said. The Ministry of Justice was committed to reaching a solution, in coordination with the Foreign Ministry. The Justice Ministry had sent the Foreign Ministry a draft bilateral protocol to the Hague Convention on International Child Abduction to guarantee the return of a child in such a case visiting from another country.

Boehmdorfer said there were also problems on the U.S. side in the Sylvester case: if the child went to the U.S. with the mother, the mother would be arrested and the child would possibly not be returned. *Boehmdorfer said he had asked for guarantees*

that this would not happen, but had received none. Boehmdorfer said it was the Foreign Ministry which had to negotiate the protocol to the Hague Convention, but reiterated that the Justice Ministry would do all it could to reach a solution. In Austria, he noted, it was judicial practice that the mother would normally get custody of a child. However, Boehmdorfer said, there would be a meeting on January 29 between members of the Foreign Ministry, the U.S. Embassy, the mother and the mother's lawyer. He said he was optimistic that this meeting would result in a "silver lining" to the case, and said he would welcome a way to guarantee return of the child after a visit.

With the exception of a meeting between the American consulate staff, Austrian Ministers, the abductor and her attorney, at which I was specifically restrained from participating, there has been no other activity in my case in all of 2004. That meeting however, inexplicably resulted only in the arrangement of a "play date" between the child(ren) of current Consul General and my daughter. Believing this to be inappropriate fraternization between my government and a wanted criminal, I expressed quite vocally my disapproval. The result was the explanation that the "play date" was in the nature of a consular visit, causing even further wounds, due to the difficulties I myself had experienced obtaining a welfare and whereabouts check for my daughter in the 1990s, as set forth above. I could see no purpose for or benefit to be gained by such a visit in light of the fact that I had seen my daughter under supervision in Austria just a few months before.

As a result of my eight years of heart-breaking experience with the Department of State, I have grave concern as to their ability to serve effectively as Central Authority under Article 7.

First, there appears to be no established protocol for the handling of outgoing cases by DOS. I can report in all honesty that my attorney and I have had dozens of conversations with personnel at the DOS that resulted in their saying something like "My hands are tied"; "What do you want me to do?"; or "Why are you calling me?" The procedures there seem irregular and haphazard and with the passage of time, the case workers change and the institutional memory of the case is lost.

Second, although time and effort has been expended by the DOS on my case in that ultimately after repeated requests by me, demarches have been issued, letters written to the Austrian Central Authority, and personal visits and contacts arranged between the Central Authorities, I must ask toward what end this work was done, with what level of preparedness, with what commitment? For example, at a particularly crucial time in my case when our sole attempt at court enforcement failed, my appeals to the DOS were met with the inexplicable "strategy" of waiting six months until the Hague Conference to "embarrass the Austrians." To me this "strategy" seemed outrageous in the context of the Convention's directive for "prompt return" of abducted children. However, this was the best I could get. In fact, the six months did indeed pass with little or nothing done on the matter. Upon return from the Hague Conference six months later, I was told that Dr. Werner Schutz, the Austrian Minister of Justice, was a very arrogant and intimidating man. There was no further information or result provided. This is the end for which Carina and I were to wait half of a year.

In March of 1999, a group from the DOS comprised of two newcomers to the Department of State, Mary Marshall and Ellen O'Connor, neither fully familiar with my case, traveled to Austria to meet with authorities there, including Dr. Werner Schutz, to discuss my case. Following the meeting, I received only an oral report from Ms. Marshall that I needed to submit yet another schedule request for access under Article 21 if I wanted the court in Austria to proceed with my petition for access. Based on my experience in the case, my expectations of the visit had been low. However, I found this outcome abominable. A report to me on the visit took months.

This report reveals a number of missed opportunities to challenge the Austrians on false representations made by them in those discussions. First, the Department of State notes that the issue of the Austrian court's knowledge of the Convention was addressed and they were told:

"Austrian judges were not unfamiliar with the Hague Process. Moreover, *[the Austrians] specifically called our attention to the fact that the Central Authority directly provides information, including prior decisions that might apply, to the courts of the first instance. The [Austrian] Central Authority underscores in this information the duties of Austria under the Hague Convention.*"

Unfortunately, Ms. Marshall and Ms. O'Connor were apparently unaware of communication between Ray Clore, Director, Office of Children's Issues, U.S. Central Authority, and Dr. Werner Schutz exchanged in December 1996 and attached in full to this submission. Mr. Clore on behalf of the Department had written in part to Dr. Schutz as follows:

"Is it possible for the Austrian Central Authority *to file a legal brief* with the courts in Austria in a pending Hague Convention Case? If so, under what circumstances will the Central Authority take this step? What can the Austrian Central Authority do to facilitate access of the father to the abducted child while this matter drags on? Can you confirm the child's location and condition? *Please inform me of what specific actions the Austrian Central Authority is taking to fulfill its obligations pursuant to Article 7 section (h) and (e) of the Convention.*"

In response, the Austrian Central Authority through Dr. Schutz stated:

"2. *The Ministry of Justice has no possibility at all to interfere with the independent judiciary. It is a basic principle that the administration and the judiciary are separated and no interference whatsoever is possible. All States based on the rule of law have to respect court orders. I cannot imagine that the U.S. Central Authority is entitled to give instructions to the courts, in particular to the Supreme Court relating the handling of the Convention.*

Having said this I have to reject very strongly – with all due respect – your allegations that the Austrian Central Authority does not comply with its obligations under the Convention. Such allegations are unfounded and in the field of international co-operation unusual, too. Acting in such a way does not promote international co-operation at all.

For these reasons I abstain to comment on your remarks relating the proceedings in the Austrian courts.

Of course it is up to the USA to make proposals for creating more appropriate legal mechanisms within the framework of the Convention in the proper international forum."

Similarly, on August 28, 1996, Dr. Schutz wrote: *"And it is quite obvious that the Ministry of Justice cannot give any instructions to a court because courts are truly independent."*

Later, on February 5, 1997 Dr. Schutz wrote to the DOS on the issue of a legal brief as follows:

"Relating to your fax-letters of 2 January 1997 and 4 February 1997, I do not want to comment on issues that have been dealt with and decided by the

independent courts. *The only issue that I want to touch is the question of legal briefs from a third person. The submitting of legal briefs by (third) interested parties is not possible under Austrian law. It is the task of the courts, in particular the Supreme Court to interpret international conventions; theoretically a court might ask an expert-opinion on questions of private international law but the initiative must be taken by the court."*

If in fact the delegation from DOS was aware of these communications, there is no evidence in the report to suggest that the comments made by Dr. Schutz were challenged on the basis of Dr. Schutz's own correspondence.

Similarly, the written report from the DOS's March 1999 meeting with the Austrians revealed that the subject of "Safe Harbor" orders was discussed generally and again our representatives were apparently unaware that a "Safe Harbor" order had been presented to the Austrian Court from the Michigan Court providing for the following safeguards for Carina's return to the U.S. The terms of the "Safe Harbor" order were:

- a. That the Father, although recognizing that under Michigan law he has right to sole custody of Carina, shall not exercise that right of sole custody upon the return of the Mother and Carina to Michigan
- b. That instead, the Mother shall live with the minor child separate and apart from the Father. The Father shall provide the Mother and Carina with a suitable furnished apartment for this purpose pending the outcome of an expedited custody hearing in Michigan.
- c. The Father shall provide airline tickets for the return of the Mother and the minor child at his cost.
- d. That upon their return, the Father shall pay all reasonable and necessary living expenses incurred by the Mother including rent, utilities, insurance, groceries, clothing, and medical expenses for Carina and incidentals for Carina, pending the outcome of an expedited custody hearing in Michigan.
- e. That this Court shall conduct an expedited evidentiary hearing on the custody of Carina pursuant to her best interests as defined by the Michigan Child Custody Act.
- f. That until such time as a determination is made by this Court regarding custody, the Father shall exercise visitation with the minor child supervised by a person other than the Mother, appointed by the Court, recognizing that this is neither an admission of a need for such supervised visitation nor an acknowledgement that he is not the legal custodial parent of the minor child.
- g. That upon confirmation that the Mother and the minor child have boarded a direct flight to Michigan, assistant U.S. Attorney Jennifer Gorland shall be instructed to dismiss the federal criminal warrant now outstanding, against the Mother in the case styled *The United States of*

America vs. Monika M. Sylvester. This would assure the Mother that she would not be arrested upon landing in Detroit for the crime of parental kidnapping.

The Austrian court rejected the "Safe Harbor" order out of hand. The trial court in Austria stated:

"Nor can the approach proposed by the father in his statement of April 28, 1997 within the meaning of the "Safe Harbor" judicature change anything in the evaluation of the case by this Court pursuant to the instructions of the Supreme Court, since on the one hand, a move to the United States by Carina's mother along with the child would mean a change in the environment the child has been used to for about a year and a half, and on the other hand, there would be no guarantee that Monika Sylvester would remain the child's main caregiver, which, in view of the above-mentioned facts, is indispensable for Carina's well-being."

Again, if the delegation from DOS were aware of the presentation of the "Safe Harbor" order, there is no evidence of it in the report. Obviously, tremendous opportunities by DOS to challenge the Austrians were missed at that meeting. It is questionable as to whether expensive meetings of this sort are of any benefit to American parents without adequate preparation, commitment and purpose.

Third, there appears to be no serious commitment in DOS to assure welfare and whereabouts checks under Article 7(a) and the Vienna Convention. There also appears to be no protocol established either relating to the form of the request to the authority in the country to which a child has been abducted or to the process for the welfare check itself. The DOS publication *International Parental Child Abduction*, eleventh edition, describes the possibilities for a welfare and whereabouts check as follows:

"If your child has been found you can request that a U.S. counselor officer visit the child. If the consul succeeds in seeing your child, he or she will send you a report on your child's health, living conditions, schooling, and other information. Sometimes consular officers are also able to send you letters or photos from your child. If the abducting parent will not permit the consular officer to see your child, the U.S. embassy or consulate will request the assistance of local authorities, either to arrange for such a visit or to have the appropriate local official make a visit and provide a report on your child's health and welfare. Contact the Office of Children's Issues to request such a visit."

I consider myself fortunate to have obtained one welfare and whereabouts check in the four years Carina has been gone. This check occurred only after my repeated requests to DOS over the years. Interestingly, DOS did instruct the Embassy to conduct a check at the place where Carina was understood to be living. Representatives from the U.S. Embassy traveled from Vienna to Graz, knocked on the door of the home where Carina was living and was told that no information about the child would be provided to the U.S. officials. Subsequently, the U.S. Embassy received a harassment complaint for their actions. Later requests by me for a welfare and whereabouts check resulted in the U.S. Embassy in Vienna first contacting opposing legal counsel only to be told that no welfare and whereabouts check would be allowed and that the child was fine. This stopped all activity on the matter.

When a welfare and whereabouts check was finally arranged, it was done so in the presence of the trial judge at the Graz courthouse. My request that the American Embassy workers take a photo of Carina for me was denied.

Fourth, there is no procedure or protocol for handling the long-term or complex cases such as mine. For years, I have attempted to remedy this situation by calling for a team approach, so that my contacts with personnel could be coordinated and so that a plan could be devised for maximizing the aftermath of the valuable ECHR decision against Austria. After more than a year of badgering the Department to assemble a "Washington Workgroup" including representatives for the Departments of State and Justice, members of Congress and Consulate staff, I was told that there was "no value" in the idea. Instead, I must drift, with no particular point of contact other than the primary level caseworker at the Department.

The Department of Justice

My experiences with the Justice Department ("DOJ") began well with the entry of an international warrant in May of 1996 under the International Parental Kidnapping Crime Act. This led to the red and yellow notices by Interpol. However, that is essentially where the participation of DOJ ended. Even my inquiries into the matter were surprisingly met with contention and hostility. The sole exception was Mary Jo Grotenrath at the Office of International Affairs who was uniformly pleasant and informative. Initially however, I was told that the criminal approach would be put on hold to see how the civil proceedings under the Hague Convention would unfold. I was told that Austria does not extradite its citizens but the U.S. does. So that if I were to go over to Austria to retrieve Carina myself, that I would run the risk of being extradited to Austria to face criminal charges there. The excuse of Austria's refusal to extradite its own nationals was used to explain away any further work on the warrant. After three years we had well seen how the civil proceedings have unfolded and still nothing was forthcoming from DOS on the warrant. In fact, after a very short period of time it became clear that the official position of the Department of Justice was to "remain neutral" on the warrant.

Neither understanding this position nor being satisfied with this situation, I continued to press for information and answers or even some interest in the warrant of any kind. For example, last year I made a request to the Assistant U.S. Attorney on the case that an extradition request be issued to Austria— even if impossible to achieve. I was denied that request. Just recently I have learned that a provisional arrest request was presented a short while ago to Italy. Italy denied the request.

I believe the United States is not responding adequately through law enforcement tools to assist American parents and internationally abducted U.S. children. Such legal action by the DOJ would serve to apply pressure on the Austrians to comply with its international treaty obligations, and perhaps the abductor to take accountability for the wrongful, illegal behavior. With the current situation of lack of support on international parental kidnapping warrants from DOJ, Carina's abductor continues to get away with complete impunity.

Ironically, the existence of the international parental kidnapping warrant, as useless as it is as a law enforcement tool, is however used as a weapon by the abductor and the Austrian courts to justify their not returning Carina to the U.S. In theory, the Austrians believe the abductor must accompany the child here upon her return or on a visit. At that time, theoretically, the abductor would be arrested and jailed and I would have free reign to enforce my valid Judgment of Divorce giving me custody of Carina. The "Safe Harbor" order to the contrary has been completely ignored by the Austrians, despite the recent statements to the U.S. Central Authority at their meeting in March.

As a result, the warrant on which very little has been attempted and nothing accomplished is in fact a detriment to Carina's return. Swift action on the warrant on the part of DOJ could have restored the balance of power in the case early and would also have been perfectly in keeping with DOJ's role as our federal law enforcement agency.

Senator Mike DeWine has stated:

"I am concerned that a small child would be taken from a parent in violation of the law without any law enforcement intervention." . . . "We go after countries that steal our products or violate patent and copyright laws, but not when they are supporting the theft of American children. What does that say about us as a country?"

The report to the Attorney General from the joint task force on the DOJ's response to international parental kidnapping cases was a disappointment to me and other similarly situated parents. It lacks backbone, relying essentially on fact that the International Parental Kidnapping Act was meant as a last resort after civil recourse under the Hague Convention failed. I perceive at least two problems with this approach.

First, a prompt criminal response allowing for the arrest of the abductor, even though theoretically leaving the child behind, is essential for re-establishing the balance of power. As time drags on, the American laissez-faire policy on these warrants looks weak and insincere. The warrant is also used as a weapon in the argument against return. Therefore, if it is to be available and of any benefit whatsoever to left behind parents, it must be utilized swiftly to its maximum effect.

Second, the proposals for law enforcement response to international parental kidnapping under the International Parental Kidnapping Act are weak and will result in no further assistance to parents of America's stolen children. For example:

- a. The report does not adequately reflect existing difficulties that reduce the efficacy of these arrest warrants when abductors flee to countries such as Austria from which nationals are not extradited;
- b. The report focuses on the fact that the arrest and extradition of the abductor does not return the abducted child. This reads as justification for not vigorously pursuing the warrant, since it is assumed that the primary purpose of the warrant and the criminal act on which it is based is the return of the child. Naturally, left-behind parents are desperate for the return of their lost children. In many cases however, the civil remedy under the Hague Convention has been so abominable an arrest and incarceration under the act may provide the only means by which to resolve the balance of power between the parents to allow for a negotiation as to how the child will be cared for.

It appears never to have been the intention of the legislature to seek the return of the child with the implementation of the International Parental Kidnapping Act. The perpetrator under the act is the abductor. The International Parental Kidnapping Act criminalized the abduction itself and seeks redress for the criminal behavior. There should be no concern by DOJ in pursuing criminals under the International Parental Kidnapping Crime Act as to whether or not the child is returned. This simply isn't relevant to the performance of the job of our federal law enforcement agency;

- c. The emphasis by DOJ in the report on the fact that a conviction under the crime act does not return the child reinforces the same institutional misunderstanding held by DOS – that being that the remedy sought by

the Hague Convention and the International Parental Kidnapping Act is a private custody matter; and

- d. The report fails in providing a swift and defined protocol for prosecuting cases and pursuing warrants under the International Parental Kidnapping Act.

The Problem of Austria

Austria plays a significant role in the bizarre result of my case that looked so hopeful from the start. As a treaty partner to the Hague Convention, Austria has committed to complying with the terms of the Convention and its implementation there. Nonetheless, its legal system works in direct opposition to the two objects of the Convention – the prompt return of the parentally abducted child into its environment of habitual residence and the provision of access by left-behind parents to parentally abducted children. The problems that arose in my case are of such a voluminous nature that they are addressed below in turn.

1. **ENFORCEMENT.** The most pronounced problem and that which was fatal to the return of Carina to the U.S. is the Austrian legal system's failure to provide for any significant and hard-hitting enforcement procedures for its own orders, relying instead on the polite knock on the door and a request for voluntary compliance. This means that it is absolutely impossible for Austria to consistently comply with the Convention since Austria cannot control the conduct of its citizens or protect the parental rights of foreign parents through their own court orders. This fact is well understood by Carina's mother who recently said to me: "Even if the courts here [in Austria] tell me what to do . . . I don't have to do it." She learned this from the successful results of her direct disregard of the initial set of orders of the Austrian courts which stated:

- "The child's mother Monika Maria Sylvester is ordered by otherwise forced action to return the minor Carina Maria Sylvester immediately to the father, Thomas Sylvester to the previous residence in Michigan, USA" (December 20, 1995, Trial Court)
- "It should also be expected from the child's mother, if she puts the well-being of the child higher than her own, that she returns with the child to the United States." (December 20, 1995, Trial Court)
- "It is the mother's freedom and is also expected of her as a responsible custody provider, that she put the welfare of the child before her interests to stay in Austria and return together with the daughter to the United States. It is then the responsibility of the appropriate American court to decide final custody." (February 19, 1996, Austrian Court of Appeals).

Despite the strong language of these orders, Carina's mother felt completely comfortable not complying with their directives. Lack of enforcement of the early Austrian orders meant that Carina would be returned only if her mother chose to do so. This fatal shortcoming puts the effectiveness of any Austrian return or access order in the hands of the abductor, who obviously chose to take the child impermissibly in the first place.

For recipients of return orders under the Hague Convention, this defect in the Austrian system means that Austria gives the abductor complete control over the situation including, every aspect of the

child's relationship with the left-behind parent. This is the antithesis of what the Hague Convention is all about. This not only limits the value of Austria as a partner to the Convention, but renders Austria a very dangerous treaty partner when American parents rely upon Austria's participation in the Convention to their detriment.

Austria is not alone in this regard. Germany and other civil law countries are treaty partners with no means to enforce court orders rendered under the Convention or otherwise.

2. RE-OPENING OF CONCLUDED HAGUE CASES. The defect of non-enforceability of return orders allows for the "re-opening" of Hague Convention cases in Austria years after a valid and final return order is entered. The "re-opening" of a Hague Convention case is not only unprecedented, but also runs counter to the inherent philosophy of the Hague Convention that a child's best interests are served when it is immediately returned to its country of habitual residence following an international parental child abduction.

The Austrian court's determination in my case to devalue the original valid and final order for return of Carina metamorphosing it into an order that Carina will not be returned is an amazing feat of legal logic. On the one hand, the order for Carina's immediate return to Michigan for a custody determination there is valid and final, but on the other hand, since the order hasn't been complied with voluntarily, the return of the child is no longer necessary. The child was not returned because the order was not enforced. Therefore, the order will not be enforced because the child was not returned. In the end, the custody determination was said to take precedence over the Hague Convention.

3. ENDLESS APPEALS ON ANY ISSUE. The Austrian legal system seemingly provides no end to any issue before it, allowing for unlimited appeals and motions until an original decision is bent so far out of shape that it is no longer the same decision. An end can be achieved as in my case, when the Austrian national finally obtains an order legally sanctioning the abduction. This creates the serious problem of extensive delay, i.e., when the file is in a higher court, no proceedings can be had on even interim matters requiring resolution such as access not related to the issue on appeal.

4. THE AUSTRIAN CENTRAL AUTHORITY DOES NOT MEET ARTICLE 7 OBLIGATIONS. The Austrian Central Authority is intractable. There is no real evidence of any interest or dedication to compliance with its duties under Article 7 despite the Austrian delegation's attempt to have the situation appear otherwise in its meeting with the U.S. Central Authority in March of this year, as referenced above.

5. GENDER AND NATIONAL BIAS IN HAGUE CASES. There exists extreme gender and national bias in favor of mothers and Austrian nationals in the Austrian courts. This is evident even in Hague Convention cases. According to the U.S. Embassy report on the March 2, 1999 meeting: "This potential scenario [custody to the father] was most culturally abhorrent when it seemed likely that the mother (rather than the father) would be separated from her child." In my access case under Article 21, the court-appointed child "expert" submitted a report to the court stating that any child between the age of six months and six years would be psychologically harmed if separated from the mother even temporarily. This opinion is maintained and advocated irrespective of Austria's participation in the Hague Convention.

The social worker who supervised my first meetings with Carina following the abduction stated the situation quite plainly—I give the mother whatever it is she wants legally, including custody under an Austrian order, and then everyone else in Austria will be in a position to consider my having access to Carina. Based on my experience, it is impossible to conceive of circumstances under which an Austrian court would award custody of a small child to an American father in the United States over an Austrian mother in Austria.

This national bias is also exemplified by the undignified but not uncommon practice of Austrian judges granting non-Austrian fathers visitation of their children only in small bits, only in Austria, and often only under supervision of the mother or a third person authorized by the mother. This bias is most startling in light of the recent European trend toward mandating family courts to preserve joint physical custody of a child.

6. ABSENCE OF COMITY FOR FOREIGN ORDERS. Austria is disrespectful of the principle of comity. In its initial determinations, Austria was quick not to acknowledge my Michigan Judgment of Divorce stating that the judicial process in the United States was lacking in even the most basic Constitutional safeguards, despite the abductor's active participation in the case through counsel. It is now three years later and the matter of Austria's acknowledgement of the Michigan Judgment of Divorce is still not resolved. Instead, the issue of the proper authority to determine Austria's recognition of foreign orders has moved to its Constitutional Court. It is difficult for me as a layman to understand this lack of respect for and consideration of court orders of other nations, particularly when the principle of comity is a well-established element of American law.

Particularly offensive is the Austrian court's assumption of jurisdiction over matters such as custody and child support in advance of an official determination as to Austria's recognition of the Michigan Judgment entered in 1996 resolving those same issues. This exercise of jurisdiction is without question premature, contradictory to established legal procedure, aggressively arrogant and revealing of the compelling drive to favor their own nationals in court proceedings.

7. FAILURE TO EXTRADITE ITS NATIONALS UNDER AMERICAN ARREST WARRANTS. Austria provides a sanctuary for child abductors wanted under internal parental kidnapping warrants. In international child abduction and wrongful retention cases, Austria refuses to extradite or prosecute Austrian nationals. This combined with the complete inability to enforce their civil orders means that an abductor can flee to Austria with complete impunity both civilly and criminally.

8. LINKING OF ARTICLE 21 HAGUE CONSIDERATION WITH ISSUES IN OTHER PENDING CASES OR LIFTING OF U.S. ARREST WARRANT. Austrian courts link the granting of access under Article 21 with other non-related issues. Carina's rights are completely independent of any other proceedings in which her parents are involved. The trial court judge in my case has told me if I accept an Austrian divorce, I will get more access to Carina. He calls it a "factual relationship." I call it "blackmail." At a recent access hearing under Article 21, the Austrian judge discussed such matters as my lifting the international warrant for the abductor's arrest and my modification of the terms of the Michigan Judgment of Divorce to comport with what is happening in the Austrian courts.

9. DISCOURAGEMENT OF SETTLEMENTS. The Austrian system discourages amicable settlements by not providing for the possibility for joint custody, contrary to the trend of most of its other European neighbors. Therefore, it eliminates the possibility of the use of "mirror orders," those being the same orders entered in the courts of both countries incorporating terms that might reflect a compromise position of both parties.

10. NO SANCTION FOR FAILURE TO COMPLY WITH HAGUE CONVENTION. Austria has been able to benefit from the Hague Convention while systematically failing to comply with its terms and thus failing to reciprocate. According to statistics from the National Center for Missing and Exploited Children, Austria has realized the return of four children from the United States to Austria under the Hague Convention since September 1995. This covers the time that the Austrian courts had ordered Carina's return to the United States. To date, Carina still has not been returned. Why is her heart considered any different than those of the Austrian children? It is a sad fact that some

countries have been able to benefit from the Convention while systematically failing to comply with its terms and thus failing to reciprocate.

11. VIOLATES U.N. CONVENTION ON RIGHTS OF THE CHILD. Austria is systematically violating its obligations of the Convention on the Rights of the Child. Austria ratified this Convention in 1992. The United States has signed, but not ratified the Convention. Specifically, the denial of Carina's right to know her father and her extended family here in the States contravenes Article 9 of the Convention on the Rights of the Child. In addition Austria violates Article 10, Carina's right to contact with parents who live in different countries; Article 18, the right of both parents to have common responsibilities for the upbringing and development of the child; and Articles 2, 5, 8, 11, 16 and 29 which also impose pertinent obligations. These obligations are systematically violated by Austria, a loud proponent of the Convention on the Rights of the Child. Austria is a country with legal systems that do not provide effective enforcement mechanisms for access/visitation and therefore, cannot comply with their obligations under either the Hague or Rights of the Child Conventions.

Recommendations

The proposed legislation under consideration by this Committee today largely inures to the benefit of foreign national parents seeking the return of their minor children under ICARA. In that respect, the essence of those sections of this legislation deals with the treaty obligations of the United States under the Hague Convention. But, with an approximately 90 percent return rate from the United States, the compliance of the United States with its Hague Convention obligations has not been the problem. Rather, a very low return rate from other Hague Parties to the US has been the problem. To the extent that the United States is interested in improving its already immensely successful work in obtaining returns under the Hague Convention, I believe such legislation is important. It is necessary that all Parties to the Hague Convention continue to improve their participation in the treaty by adjusting their implementing legislation to make the treaty work effectively. The key to such efforts is of course reciprocity. Along with providing excellent service to the citizens of other party nations, our government must expect and in certain circumstances demand excellent participation in the treaty by those countries in exchange. Taken as a whole, therefore, with the possible exception of Section 11, the proposed legislation will not necessarily assist parents similarly situated to me.

Hence, just as I myself would expect the Republic of Austria to continually enact legislation to improve its participation in the Hague Convention, I would also expect the United States to do the same. Although not the subject of today's hearing specifically, I submit my particular case to request support for amendments to this legislation which would specifically benefit American left-behind parents similarly situated to myself. It is eminently clear that my situation will unquestionably happen again in Austria and other civil law countries without any legal enforcement mechanism like contempt of court in our legal system, i.e., there will be and are now situations where return, access, or visitation orders are not being enforced in foreign countries. In these situations, American parents have a great deal of difficulty seeking assistance over the long term morally, diplomatically and financially. As such, I address my comments below to incorporate my proposals and thoughts for such additional legislation.

SECTION 2: APPLICABILITY OF FEDERAL TORT CLAIMS PROVISIONS TO NCMEC AND ITS EMPLOYEES

- This section highlights the fact that NCMEC works in this context almost exclusively for foreign parents seeking the return of their children from the United States to another country. At the same time, NCMEC is prevented by the State Department from providing

similar, meaningful assistance to left-behind American parents. Before blanket immunity is granted, Congress should consider that such immunity could also apply when American children are seized by U.S. law enforcement and turned over to foreign parents without due process of law (e.g., the Hague Convention process). In that situation, the American parents involved may be denied recourse.

SECTION 3: JURISDICTION OVER COMPETING STATE CUSTODY ORDERS

- Some clarification of the language of this section is needed to ensure that this provision cannot be used to benefit foreign child abductors (and their governments that pay legal fees in U.S. courts and at home). Some foreign governments and abductors have attempted to use U.S. courts to extinguish U.S. court orders and defer to foreign custody jurisdiction. For example, the Swedish government has financed such litigation to the Supreme Courts of Utah and Virginia against left-behind American parents with valid U.S. custody orders at terrible financial hardship to those parents. It is not clear what value this provision would have for left-behind American parents dealing with countries that ignore Article 1 of the Hague Convention and do not respect U.S. custody orders.

SECTION 4: NATIONAL REGISTRY OF CUSTODY ORDERS

- This section is helpful domestically and could be of assistance on an intra-state basis if it could be procedurally implemented. As to left-behind American parents, it appears to have limited benefit.

SECTION 5: DETENTION OF CHILDREN IN CERTAIN CIRCUMSTANCES

- This provision might be useful in preventing attempted outgoing cases, however it does not help American parents already left behind and it does not help to get American children back once abducted.
- Could be difficult to implement uniformly.

SECTION 6: INTERNATIONAL CHILD ABDUCTION REMEDIES

- This provision as drafted will assist primarily foreign parents in incoming cases with little or no benefit for left-behind American parents in outgoing cases.
- Its benefits for foreign parents should be based on reciprocity, and safeguards should be added so that it cannot be used to challenge U.S. custody orders.
- It would greatly assist judges if their training would include a review of the custody laws and enforcement capabilities of each country, so that U.S. judges are fully aware of the consequences of subjecting American children to foreign custody jurisdiction.
- The section provides no U.S. financial assistance for American left-behind parents.

SECTION 7: REPORTS RELATING TO INTERNATIONAL CHILD ABDUCTION

- This provision should be amended to require the State Department to negotiate bilateral access and visitation agreements with Hague countries, since very few have enforceable access or visitation for left-behind American parents.
- Subsection (a) is flawed because it applies only to non-Hague countries. Like certain other provisions of existing law (e.g., a provision of immigration law that prohibits U.S. visas for child abductors only if they are from non-Hague countries), it is based on the premise that

all is well so long as a country is a party to the Hague Convention. We have found this not to be true.

- This provision is an opportunity for badly-needed remedial measures and the fine-tuning concerning the annual State Department report on compliance with the Hague Convention.
- Reporting on warrants should apply for all warrants, not just those issued during the preceding year, and should relate how the warrant is received by the courts and authorities of each country.

SECTION 8: SUPPORT FOR UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

- Inherent in support for this provision is the ironic circumstance that some foreign countries have sought to persuade U.S. courts to defer to their custody jurisdiction and to extinguish U.S. custody orders even though the parents had stipulated to continuing exclusive jurisdiction in the U.S prior to a wrongful retention or removal. The UCCJEA therefore allows for this anomaly without a thorough examination of the foreign country's legal and social welfare system, especially with regard to the consequences of child custody jurisdiction over American children (i.e., frequency of American and other foreign parents being granted custody, enforceability of access/visitation/return orders, financing and other support for child abduction/retention activities).

SECTION 11: SUPPORT FOR INCREASED U.S. CONTRIBUTION TO HAGUE PERMANENT BUREAU

- There is no specific identification for how the money will be used by the Hague Permanent Bureau or assurances that the system will improve.
- Increased U.S. contribution should be made contingent on least 6 conditions being met by the Permanent Bureau:
 - 1) Guidance to States Parties of the Hague Convention that they cannot fully comply with their obligation unless and until they adopt enforcement legislation comparable to our contempt of court that permits swift and sure enforcement of access, visitation, and return orders.
 - 2) Guidance to States Parties reminding them that the object and purpose of the Convention in Article 1 includes respect for foreign custody laws and court orders (i.e., comity).
 - 3) A report to States Parties and the public on compliance with the Convention including country-by-country statistics.
 - 4) A report to States Parties and the public on the access/visitation situation in each country, especially with regard to enforceability and compliance with Article 21 of the Convention.
 - 5) Public and strong support for the position that any multilateral treaty on child support enforcement must include safeguards to exclude cases of attempted enforcement against the parents of left-behind children where there has been a violation of civil or criminal law, a violation of court orders, a violation of the Hague Convention, or the absence of substantial, enforceable access/visitation with the child in the left-behind parent's country.
 - 6) Public and strong support for inclusion of left-behind parents in the delegations of States Parties to the periodic Hague Convention review conferences

In addition, in order to assist left-behind American parents, I submit the following proposals for legislation.

1. Shift the lead responsibility for “outgoing” U.S. cases from the State Department to NCMEC, with NCMEC to hold the case files and report directly to Congress and parents.

- This would give American children and their left-behind parents an effective advocate for the first time by shifting the lead responsibility for handling cases of internationally abducted American children wrongfully retrained abroad from the Department of State to NCMEC (which already performs this function for “incoming” cases), with NCMEC to hold the case files and to report directly to Congress and left-behind parents on the efforts of the Department of State and the foreign governments concerned to bring these children home.

- NCMEC should be given comparable responsibility for all outgoing cases and perhaps be relieved of handling incoming cases. The State Department should be required to inform all U.S. courts of the consequences of American children being subjected to foreign custody jurisdiction, and the Central Authority function should be shifted out of the State Department (to NCMEC or the Civil Division of the Justice Department).

In the interim, require the Department of State to share all information in “outgoing” cases with NCMEC and left-behind parents.

It is recommended that the proposed provision would read as follows:

Section _____. Coordination with the National Center for Missing and Exploited Children

In cases involving parental abduction or wrongful retention of American children abroad, the Department of State shall cooperate and coordinate fully with the National Center for Missing and Exploited Children and, not later than 24 hours after the Department of State learns of a possible such abduction or retention, the Secretary of State shall submit to the National Center a request for assistance and a report including at least the following information:

- (a) The name of the abducted or wrongfully retained child.
 - (b) The name and contact information of the left-behind parent(s) or legal guardian seeking the return of the child.
 - (c) The name and contact information for the law enforcement officials and courts assisting in the effort to return the child, including the agencies that employ them.
 - (d) The country to which the child is believed to have been abducted or in which the child is wrongfully retained.
 - (e) The name of the person believed to have abducted or wrongfully retained the child.
2. In accordance with both the letter and spirit of the Congressional reporting requirements, add a provision to this legislation which passes remedial legislation to require the Department of State to submit a complete and accurate annual report to Congress (cleared by NCMEC) on

foreign government compliance with the Hague child abduction convention, on the number of abducted American children who actually return home, and on foreign government child abduction support systems, such as Austria, Germany and Sweden, with dissemination by the State and Justice Departments to all U.S. courts and family law attorneys.

It is recommended that the proposed provision would read as follows:

Section _____. Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction

Section 2803(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (as contained in division G or Public Law 105-277), as amended by the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act for Fiscal Years 2000 and 2001, is further amended

- (a) In paragraph (1), by inserting “unsuccessful” before the word “applications,” and by striking “that remain unresolved more than 18 months after the date of filing” and substituting “or of which the Central Authority of the United States is aware, where the children concerned remain abroad and have not been returned to the United States more than 6 months after the date of filing.”
 - (b) By inserting after paragraph (7) the following new paragraph:
“(8) A description of the efforts of the Secretary of State to disseminate this Report to all foreign governments, all federal and state courts, federal and state law enforcement authorities, family law attorneys, parents, and other interested parties.”
3. Prohibit the Department of State from negotiating reciprocal child support agreements (under P.L. 104-193), Section 459A) with the worst offending countries, and ensure that such agreements with any country exclude all cases where there has been a violation of U.S. law or court orders, a violation of the Hague Convention, or denial of substantial access/visitation in the U.S. for the American parent. the child support enforcement activities of the Department of State.

It is recommended that the proposed provision would read as follows:

Section _____. Foreign Child Support Orders

- (a) A foreign child support order shall not be enforced in any U.S. federal or state court or by other means in the United States against any U.S. citizen or lawful permanent resident parent in any case in any case involving:
 - (1) a violation of United States federal or state civil or criminal law;
 - (2) a violation of court orders issued by any U.S. federal or state court;
 - (3) a violation of the Hague Convention on the Civil Aspects of International Child Abduction;
 - (4) a lack of substantial and swiftly enforceable access to and visitation with the child(ren) concerned in the United States; OR
 - (5) such order was granted in an ex parte manner.
- (b) The Department of State is prohibited from concluding any bilateral or multilateral agreements with foreign governments that fail to include the safeguards listed in sub-section (a) above.

4. Require the Department of State to include information on each country's child custody and visitation system, including enforcement measures, if any, in the children's rights section of the annual human rights reports.

It is recommended that the proposed provision would read as follows:

Section _____. Annual Human Rights Country Reports

Commencing with the 2004 Report, the Department of State shall include in each annual human rights country report under the existing heading of "Child Abuse" or under a new heading of "Parental Care" or "Family Law" detailed information on the following:

- (1) a description of the manner in which the legal and social welfare systems respect and enforce (e.g., by means of a mechanism comparable to contempt of court in the U.S.) the right of a child to have substantial, frequent, and swiftly enforceable access and visitation with both parents in situations where the parents reside separately, including the right of a child whose parents reside in different countries to maintain regular personal relations and direct contacts with both parents by means of access and visitation in both countries;
 - (2) a description of the extent to which the legal and social welfare systems of the country respect foreign child custody order through the principle of comity or otherwise; and
 - (3) a description of the extent to which the legal and social welfare systems of the country respect and enforce the principle that both parents have a common, shared responsibility for the upbringing and development of their children.
5. Require the Department of State to include information on each country's child custody and visitation system, including enforcement measures, if any, and recognition of U.S. court order in the country-by-country international parental child abduction Flyers which are posted on its website.
 6. Direct the Department of State to issue a definitive treaty interpretation to all U.S. courts that the "grave risk" exception in Article 13 of the Hague Convention (as grounds for not returning a child to the place of habitual residence) exists in any case where the other country cannot guarantee the American parent enforceable visitation in the United States.
 7. Prohibit the use by NCMEC of U.S. Government funds solely to assist foreign governments and parents, adding the funding to assist left-behind American parents.
 8. Require the Department of State to negotiate bilateral child access and visitation agreements with the worst offending countries, starting with Austria, Honduras, Mauritius, Mexico, Columbia, Ecuador, Turkey, Switzerland, Romania, Panama, Poland, Bahamas, Greece, Hungary, Sweden, Germany, Spain, Israel and Saudi Arabia.
 9. Publicize on the Department of State website the very low return rate of abducted children to the United States, compared to the 90 percent return rate from the U.S. in Hague cases, and identify the countries concerned.
 10. Publicize on the Department of State website the countries that have nothing like our contempt of court mechanism to enforce civil court orders for access, visitation, or return of children to the U.S. under the Hague Convention.

- 11.** Provide left-behind parents with complete information on everything the U.S. Government has done, or failed to do, to bring their children home.
- 12.** Prohibit the extradition of U.S. citizens for parental child abduction to countries that will not extradite their nationals for that offense or will not consistently return American children under the Hague Convention.
- 13.** Prohibit new law enforcement treaties or agreements with governments that support abduction and retention of American children.
- 14.** Revise Section 212(a) of the Immigration and Nationality Act to delete the provision making foreign child abductors admissible to the United States so long as the abducted child is located in a country that is party to the Hague Convention.
- 15.** Create an exception to the Foreign Sovereign Immunities Act permitting American parents to sue any foreign government for damages in U.S. District Courts, if that government is directly supporting or otherwise participating in criminal activity against them (i.e. abduction and retention of their American children).

Carina...

Children

Abducted

and/or

Retained

Internationally

Need

Assistance



International Child Abduction

Case of Carina Sylvester

Abducted from the United States to Austria

October 30, 1995

**Supreme Court
Of Austria**

Affirms Order of
December 20, 1995
To return child
to the United States

February 27, 1996

**State of
Michigan
Circuit Court**

Judgement of Divorce
and Custody to father

April 16, 1996

**NO
ENFORCEMENT
OF THE LAW**

Interpol



Red Notice
For arrest of the fugitive

Yellow Notice
To locate the child

January 26, 1997

Thomas R. Sylvester
June 22, 2004

**United States
District Court**

Warrant for Arrest
of Abductor

May 29, 1996

**Summary Chart on the United States Department of State
Reports on Compliance with The Hague Convention on the Civil Aspects of International Child Abduction**

Country	1999	2000	2001	2002	2004
Austria	Noncompliant	Noncompliant	Noncompliant	Noncompliant	Noncompliant
Honduras	Noncompliant	Noncompliant	Noncompliant	Noncompliant	Noncompliant
Mauritius	Noncompliant	Noncompliant	Noncompliant	Noncompliant	Noncompliant
Mexico	Noncompliant	Not Fully Compliant	Not Fully Compliant	Noncompliant	Noncompliant
Colombia		Country of Concern	Country of Concern	Country of Concern	Noncompliant
Ecuador					Noncompliant
Turkey					Noncompliant
Switzerland		Country of Concern	Country of Concern	Not Fully Compliant	Not Fully Compliant
Romania					Not Fully Compliant
Panama		Noncompliant	Noncompliant	Noncompliant	Country of Concern
Poland		Country of Concern	Country of Concern	Country of Concern	Country of Concern
Bahamas			Country of Concern	Country of Concern	Country of Concern
Greece					Country of Concern
Hungry					Country of Concern
Sweden	Noncompliant	Not Fully Compliant	Country of Concern		Enforcement Problems
Germany		Not Fully Compliant	Country of Concern	Country of Concern	Enforcement Problems
Spain			Country of Concern	Country of Concern	Enforcement Problems
Israel					Enforcement Problems

United States District Court

Eastern

DISTRICT OF Michigan-SD

UNITED STATES OF AMERICA
V.

Monika Maria Sylvester

WARRANT FOR ARREST

CASE NUMBER: **96-80432**
~~28708-96~~

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest Monika Maria Sylvester
Name

and bring him or her forthwith to the nearest magistrate to answer a(n)

☐ Indictment ☐ Information ☒ Complaint ☐ Order of court ☐ Violation Notice ☐ Probation Violation Petition

charging him or her with (brief description of offense):

International Parental Kidnapping

A TRUE COPY

CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY [Signature]

DEPUTY CLERK

1204

in violation of Title 18 United States Code, Section(s) _____

VIRGINIA M. MORGAN

Name of Issuing Officer

VIRGINIA M. MORGAN

Signature of Issuing Officer

MAGISTRATE JUDGE VIRGINIA MORGAN

Title of Issuing Officer

May 29, 1996 Detroit, Michigan
Date and Location

Bail fixed at \$ _____ by _____
Name of Judicial Officer

RETURN

This warrant was received and executed with the arrest of the above-named defendant at _____

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE OF ARREST		

SYLVESTER Carina Maria
F-3/1-1997



PRESENT FAMILY NAME: SYLVESTER FORENAMES: Carina Maria SEX: F

DATE AND PLACE OF BIRTH: 11th September 1994 - Royal Oak, Michigan, United States

FATHER'S FAMILY NAME AND FORENAMES: SYLVESTER Thomas R.

MOTHER'S MAIDEN NAME AND FORENAMES: ROSSMANN Monika Maria

IDENTITY CONFIRMED - DUAL NATIONALITY: UNITED STATES CITIZEN AND AUSTRIAN (CONFIRMED)

DESCRIPTION: Height 74 cm, weight 11 kg, brown hair, brown eyes.

TEETH: Good condition.

IDENTITY DOCUMENT: United States Social Security No. 375-17-6986.

AREAS/PLACES FREQUENTED OR COUNTRIES LIKELY TO BE VISITED: Austria (Neuseiersberg, Graz), United States.

LANGUAGE SPOKEN: German.

CIRCUMSTANCES OF DISAPPEARANCE: On 30th October 1995, SYLVESTER Monika Maria took her daughter SYLVESTER Carina Maria and left the United States for Graz, Austria. On 20th December 1995, the court in Graz ordered that SYLVESTER Carina Maria be returned to her father, SYLVESTER Thomas R.; SYLVESTER Monika Maria appealed against this order and the child was not returned. Visits by the father on 24th and 27th December were also ordered but the child was not brought to the location agreed upon on either date. On 16th April 1996, the court in the County of Oakland, Michigan, United States, granted default judgement of divorce and ordered sole legal and physical custody of SYLVESTER Carina Maria to SYLVESTER Thomas R.. SYLVESTER Monika Maria refuses to return the child.

ADDITIONAL INFORMATION: Her mother, SYLVESTER Monika Maria, born on 29th April 1962, is the subject of red notice File No. 20077/96, Control No. A-26/1-1997 (see photograph).

PURPOSE OF NOTICE: Issued at the request of the United States authorities in order to locate this person. If traced, please place her in the care of a child welfare organization and contact her country's nearest diplomatic representative. Please send any information available to INTERPOL WASHINGTON (Reference 96-05-05496/JRP of 17th January 1997) and the ICPO-Interpol General Secretariat.

File No. 20080/96

Control No. F-3/1-1997

CONFIDENTIAL INTENDED ONLY FOR POLICE AND JUDICIAL AUTHORITIES

SYLVESTER Monika Maria
A-26/1-1997



PRESENT FAMILY NAME: SYLVESTER FAMILY NAME AT BIRTH: ROSSMANN

FORENAMES: Monika Maria SEX: F
DATE AND PLACE OF BIRTH: 29th April 1962 - Graz, Austria

FATHER'S FAMILY NAME AND FORENAME: ROSSMANN Werner
MOTHER'S FORENAME: Gertraud

IDENTITY CONFIRMED - NATIONALITY: AUSTRIAN (CONFIRMED)

DESCRIPTION: Height 173 cm, weight 70 kg, dark brown hair, brown eyes.

DISTINGUISHING MARKS AND CHARACTERISTICS: Mole on left side of chin.

IDENTITY DOCUMENTS: United States Social Security No. 375-17-6462; Austrian passport No. W-0282151.

OCCUPATION: Secretary.

COUNTRIES LIKELY TO BE VISITED: United States, Austria (Neuseiersberg, Graz).

LANGUAGES SPOKEN: German, English.

ADDITIONAL INFORMATION: Her daughter, SYLVESTER Carina Maria, born on 11th September 1994, is the subject of yellow notice File No. 20080/96, Control No. F-3/1-1997 (see photograph).

SUMMARY OF FACTS OF THE CASE: On 30th October 1995, SYLVESTER Monika Maria took her daughter SYLVESTER Carina Maria and left the United States for Graz, Austria. On 20th December 1995, the court in Graz ordered that SYLVESTER Carina Maria be returned to her father, SYLVESTER Thomas R.; SYLVESTER Monika Maria appealed against this order and the child was not returned. Visits by the father on 24th and 27th December were also ordered but the child was not brought to the location agreed upon on either date. On 16th April 1996, the court in the County of Oakland, Michigan, United States, granted default judgement of divorce and ordered sole legal and physical custody of SYLVESTER Carina Maria to SYLVESTER Thomas R.. SYLVESTER Monika Maria refuses to return the child.

REASON FOR NOTICE: Wanted on arrest warrant No. 96-80432, issued on 29th May 1996 by the judicial authorities in Detroit, Michigan, United States, for international parental kidnapping. EXTRADITION WILL BE REQUESTED FROM ALL COUNTRIES WITH WHICH THE UNITED STATES HAS AN EXTRADITION TREATY CURRENTLY IN FORCE WHICH PERMITS EXTRADITION FOR THE OFFENCE CHARGED. If found in a country from which extradition will be requested, please detain; if found elsewhere, please keep a watch on her movements and activities. In either case, immediately inform INTERPOL WASHINGTON (Reference 96-05-05496/JRP of 17th January 1997) and the ICPO-Interpol General Secretariat.

File No. 20077/96

Control No. A-26/1-1997

CONFIDENTIAL INTENDED ONLY FOR POLICE AND JUDICIAL AUTHORITIES



**WANTED BY
THE FEDERAL BUREAU OF INVESTIGATION**



MONIKA SYLVESTER

On October 30th, 1995, Carina Sylvester, then thirteen months old, was taken to Graz, Austria, by her mother, Monika Sylvester. On December 20th of that year, a court in Graz ordered Carina's return to her father, Thomas Sylvester. Monika Sylvester refused. She has also refused to comply with an Austrian court order to permit the father to see the child. On January 19th, 1996, the Court of Appeals in Graz ordered Carina's return to her father. This ruling was confirmed by the Austrian Supreme Court on February 27th of that year. Monika Sylvester again refused. On May 10th, 1996, Austrian judicial authorities attempted to enforce the return orders but failed to locate the child. Nineteen days later, authorities in Detroit, Michigan, issued a warrant for Monika Sylvester's arrest for international parental kidnapping. An arrest notice has been issued by INTERPOL.

Monika Sylvester was born Monika Maria Rossmann in Graz, Austria, on April

29th, 1962. She is one-meter seventy three centimeters tall, and weighs seventy kilograms. She has dark brown hair, brown eyes, and a mole on the left side of her chin. She speaks German and English, and travels on an Austrian passport.



Carina Sylvester

The abducted child, Carina Maria Sylvester, was born in Royal Oak, Michigan, on September 11th, 1994. She has brown hair and brown eyes. She speaks German.

If you have any information concerning Monika Sylvester, or the abducted child, Carina Sylvester, you should contact the nearest U.S. embassy or consulate. Or call the National Center for Missing and Exploited Children at 00-8000-843-5678. The identities of all informants will be kept confidential.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF SYLVESTER v. AUSTRIA

(Applications nos. 36812/97 and 40104/98)

JUDGMENT

STRASBOURG

24 April 2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sylvester v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mr G. BONELLO

Mr P. LORENZEN,

Mrs N. VAJIC,

Mrs S. BOTOUCHAROVA,

Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 3 April 2003,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 36812/97 and 40104/98) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Thomas Richard Sylvester, a national of the United States of America, and Ms Carina Maria Sylvester, a national of Austria and of the United States of America ("the applicants"), on 26 May 1997 and 26 February 1998 respectively.

2. The applicants were represented by Mr S. Moser, a lawyer practising in Graz. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicants alleged that the non-enforcement of the final return order under the 1980 Hague Convention on the Civil Aspects of International Child Abduction had violated their rights under Articles 6 and 8 of the Convention.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the former Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 24 October 2000 the Court decided to join the applications and to communicate them to the respondent Government.

7. The applicant and the Government each filed written observations on the admissibility and merits. In addition, third-party comments were received from Mrs Monika Sylvester, the second applicant's mother, Mrs Jan Rewers McMillan, attorney at law, and the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, non-governmental organisations concerned with the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which had each been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

9. By a decision of 26 September 2002 the Court declared the applications admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants were born in 1953 and 1994 respectively. The first applicant lives in West Bloomfield (Michigan) and the second applicant lives in Graz.

11. The first applicant married an Austrian citizen in April 1994. The marriage was concluded in the United States of America, where the couple set up their common residence. On 11 September 1994 their daughter, the second applicant, was born. The family's last common residence was in Michigan. Under the law of the State of Michigan the parents had joint custody over the second applicant.

12. On 30 October 1995 the first applicant's wife, without obtaining his consent, left the United States with the second applicant and took her to Austria.

13. On 31 October 1995 the first applicant, relying on the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), requested the Austrian courts to order the second applicant's return. In these and the subsequent proceedings the first applicant was represented by counsel.

14. On 3 November 1995 the second applicant's mother filed an application with the Graz District Civil Court (*Bezirksgericht für Zivilrechtssachen*) for the award of sole custody over the second applicant.

15. On 20 December 1995 the Graz District Civil Court, after having heard evidence from the first applicant and his wife and the oral statement of an expert in child psychology, Dr. K., ordered that the second applicant be returned to the first applicant at her former place of residence in Michigan.

16. The court, noting that under Michigan law the first applicant and his wife had joint custody of their daughter, found that the first applicant's wife had wrongfully removed the child within the meaning of Article 3 of the Hague Convention. Moreover, it dismissed the mother's claim that the child's return would entail a grave risk of physical or psychological harm within the meaning of Article 13 (b) of the Hague Convention. It considered that the second applicant's return could not be hindered by the fact that the mother was her main person of reference and that returning could cause a massive trauma affecting her development. Otherwise, mothers of small children could easily circumvent the aim of the Hague Convention. As to the mother's allegation that the first applicant regularly masturbated in the presence of the child, the court referred to the expert's statement that such conduct would, in view of the child's tender age, not cause immediate harm. The fact that such conduct, if proved, could in the long run be harmful to the child would have to be assessed in the custody proceedings. Finally, it held that the mother could be expected to return with the second applicant to the United States.

17. On 19 January 1996 the Graz Regional Civil Court (*Landesgericht für Zivilrechtssachen*) dismissed an appeal by the second applicant's mother.

18. The Regional Court confirmed the District Court's assessment as regards the question whether the second applicant's return would entail a grave risk of physical or psychological harm within the meaning of Article 13 (b) of the Hague Convention. It noted that the onus of proof was on the person opposing the return, i.e. the second applicant's mother. Further, it noted that the statement of the expert in child psychology had denied that there was any such risk. That statement had been made on the assumption that the mother's allegations were true. However, the Regional Court emphasised that the truth of these allegations had not been proved and that the District Court had had the benefit of hearing the first applicant and, thus, of forming a personal impression of him.

19. On 27 February 1996 the Supreme Court (*Oberster Gerichtshof*) dismissed a further appeal by the second applicant's mother.

20. On 27 February 1996 the first applicant filed an application for enforcement of the return order of 20 December 1995.

21. Meanwhile, the first applicant had started divorce proceedings before the Oakland Circuit Court (Michigan). By a decision of 16 April 1996, the court pronounced a default judgment of divorce. Further, it awarded the first applicant sole custody of the second applicant and

ordered that the second applicant should reside with the first applicant in the event of her return.

22. On 7 May 1996 the file arrived again at the Graz District Civil Court.

23. On 8 May 1996 the Graz District Civil Court ordered the enforcement of the return order under section 19 (1) of the Non-Contentious Proceedings Act (*Ausserstreitgesetz*). It noted that it was necessary to order coercive measures as there were indications that the mother was obstructing the child's return. She had given an interview to a local newspaper according to which she frequently changed her whereabouts and was determined not to let the child be taken away from her.

24. In the early hours of 10 May 1996, an attempt to enforce the return order was made in accordance with the terms set out in the order of 8 May. A bailiff, assisted by a police officer, a locksmith and a representative of the Youth Welfare Office, appeared at the house where the second applicant and her mother were living. The first applicant was also present. A search carried out in the house, necessitating the use of force against the second applicant's mother and the forceful opening of several doors, remained unsuccessful. On the occasion of the enforcement attempt the Supreme Court's decision of 27 February 1996 and the enforcement order of 8 May 1996 were served on the second applicant's mother.

25. On 15 May 1996 the second applicant's mother appealed against the decision of 8 May 1996 and again filed an application for the award of sole custody of the second applicant.

26. On 29 May 1996 the United States District Court, Eastern District of Michigan, issued an arrest warrant against the second applicant's mother on suspicion of international parental kidnapping.

27. On 18 June 1996 the first applicant made a further application for enforcement of the return order.

28. By a decision of 25 June 1996 the Graz District Civil Court, at the request of the second applicant's mother, transferred jurisdiction to the Leibnitz District Court, in the judicial district of which the second applicant had purportedly established her residence.

29. On 29 August 1996 the Graz Regional Civil Court granted an appeal by the first applicant against the transfer of jurisdiction and, on the mother's appeal, quashed the Graz District Civil Court's enforcement order of 8 May 1996 and referred the case back to it.

30. Referring to section 19 (1) of the Non-Contentious Proceedings Act, the court found that, in the enforcement proceedings, the child's well-being had to be taken into account in so far as a change in the situation had occurred since the issue of the return order and the taking of coercive measures. However, under Article 13 of the Hague Convention, this question was not to be examined by the court of its own motion but only upon an application by the person opposing the return. Following the

service of the enforcement order of 8 May 1996 the mother had submitted, in particular, that she was the second applicant's main person of reference. Because of the lapse of time, the second applicant no longer recognised her father when she was shown his picture. By being taken away from her mother the child would suffer irreparable harm. The court therefore ordered the District Court to examine whether the situation had changed since the return order of 20 December 1995. It also ordered the District Court to obtain the opinion of an expert child psychologist on the question whether the child's return would entail a grave risk of physical or psychological harm and whether coercive measures were compatible with the interests of the child's well-being.

31. Between May and December 1996 numerous letters were exchanged between the United States Department of State and the Austrian Ministry of Justice, acting as their respective States' Central Authorities under the Hague Convention. The United States Department of State repeatedly requested information as to which steps had been taken to locate the second applicant and to enforce the return order of 20 December 1995. The Austrian Ministry of Justice replied that the first applicant was represented by counsel in the Austrian proceedings and that it was up to him to take all necessary steps to obtain the enforcement of the return order. It also pointed out that there were only rather limited possibilities to locate a child who had disappeared after a return order had been made.

32. On 15 October 1996 the Supreme Court dismissed an appeal by the first applicant and set aside the enforcement order of 8 May 1996. It noted in particular that the notion of the child's well-being was central to the entire proceedings. When ordering coercive measures under section 19 (1) of the Non-Contentious Proceedings Act, the court had to take the interests of the child's well-being into account, despite the fact that the return order was final, if the relevant situation had changed in the meantime. Having regard to the aims of the Hague Convention, a refusal of coercive measures was only justified if the child's return would entail a grave risk of physical or psychological harm for the child within the meaning of Article 13 (b) of the Hague Convention.

33. The Supreme Court acknowledged that particularly difficult problems arose in cases in which the abductor had created the situation in which the return represented a serious danger to the child's well-being. Where the abductor of a small child was the latter's main person of reference and refused to return with the child, a serious threat to the child's well-being might arise. Nevertheless, Article 13 (b) of the Hague Convention made clear that the child's well-being took priority over the Convention's general aim of preventing child abduction. Reasons of general deterrence or, in other words, the aim of showing that child abduction was not worthwhile could not justify exposing a child to a grave risk of physical or psychological harm.

34. In the present case, the mother had claimed that the child, who was now more than two years old, had become alienated from the father. The child's abrupt removal from her main person of reference and her return to the United States would cause her irreparable harm. The Supreme Court emphasised that the particularity of the case lay in the fact that, in the main proceedings, the courts had denied that there was any risk of psychological harm (as a result of the alleged sexual behaviour of the first applicant) exclusively on account of the child's tender age. In these circumstances, it could not be excluded that the child, who was now more than two years old and had been living solely with her mother for more than a year, would suffer grave psychological harm in the event of a return to her father. Thus, the Regional Court had rightly found that the question whether the return order could be enforced by coercive measures needed further examination, including an opinion by an expert in child psychology. It might also prove necessary to assess whether or not the mother's allegations were at all true.

35. In accordance with the Supreme Court's decision, the case was referred back to the Graz District Civil Court.

36. On 23 April 1997 the Oakland Circuit Court issued a "safe harbour" order, valid until 21 October 1997, which provided, *inter alia*, that pending determination of custody in expedited proceedings, the first applicant would not exercise his right to sole custody of the child; the second applicant would live with her mother away from the first applicant, who would undertake to cover their living expenses; and the arrest warrant against the mother would be set aside as soon as she and the second applicant boarded a direct flight to Michigan.

37. On 29 April 1997 the Graz District Civil Court dismissed an application by the first applicant for enforcement of the return order.

38. In the continued proceedings, the expert on child psychology, Dr. K., had submitted his opinion on 26 March 1997 and the first applicant had been given an opportunity to comment. On the basis of the expert opinion, the court found that since the second applicant's birth her mother had been her main person of reference. However, the first applicant had had regular contact with her until 30 October 1995, the date of her abduction. Thereafter they had had no contact at all. Since the return order had been made, a year and four months had elapsed and the first applicant had become a complete stranger to the second applicant. Given that a young child needed a stable relationship with the main person of reference at least until the age of six, the second applicant's removal from her main person of reference, namely her mother, would expose her to serious psychological harm. Having regard to the considerable lapse of time since the return order had been made on 20 December 1995, the District Court found that there had been a change in the relevant circumstances, in that the second applicant had lost all contact with the first applicant while her ties with her mother and her maternal

grandparents had become ever closer. Consequently, her return would expose her to serious psychological harm.

39. The court noted the first applicant's statement of 28 April 1997 and his offer within the meaning of the “safe harbour” case-law but considered that this offer did not guarantee that the second applicant's relationship with her main person of reference would be preserved in the long run. As this relationship was indispensable for her well-being, the application for enforcement of the return order had to be dismissed.

40. On 28 May 1997 the Graz Regional Civil Court dismissed an appeal by the first applicant. It shared the District Court's view that the situation had changed fundamentally since the issuing of the return order. At that time the second applicant had been much younger and, given the short time which had elapsed between her abduction and the issuing of the return order, had not yet lost contact with the first applicant. A return of the second applicant accompanied by her mother could not be envisaged either. Apart from the reasons adduced by the District Court, the mother would face criminal prosecution in the United States and the child would, accordingly, be taken away from her.

41. On 2, 3 and 4 June 1997 the first applicant was granted a couple of hours of supervised access to the second applicant.

42. On 9 September 1997 the Supreme Court dismissed a further appeal by the first applicant on the ground that it did not raise any important legal issues.

43. On 29 December 1997 the second applicant's mother was awarded sole custody of the second applicant by the Graz District Civil Court. It noted that Article 16 of the Hague Convention, which prohibited the State to which the child has been abducted from taking a decision on custody while proceedings for the child's return were pending, no longer applied, as the decision not to enforce the return order had become final. Following appeal proceedings the judgment became final on 31 March 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

44. The preamble of the Convention, which has been incorporated into Austrian law, includes the following statement as to its purpose:

“...to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, ...”

45. The object of such a return is that, following the restoration of the status quo, the conflict between the custodian and the person who has

removed or retained the child can be resolved in the State where the child is habitually resident. This principle is based on the consideration that the courts of the State of habitual residence are usually best placed to take custody decisions.

Article 3

“The removal or the retention of a child is to be considered wrongful where

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or the retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. ...”

Article 7

“Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures

(a) To discover the whereabouts of a child who has been wrongfully removed or retained;

(b) To prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) To secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) To exchange, where desirable, information relating to the social background of the child;

(e) To provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) To initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

(g) Where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

(h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) To keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.”

Article 11

“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay ...”

Article 12

“Where a child has been wrongfully removed or retained in terms of Article 3 ..., the authority concerned shall order the return of the child forthwith.”

Article 13

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that ...

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. ...”

B. The Non-Contentious Proceedings Act

46. Section 19 (1) provides that adequate coercive measures are to be taken without any further proceedings against a party refusing to comply with court orders.

47. According to the Supreme Court's case-law the courts have, in any proceedings relating to the removal of a child, the courts have to take the interests of the child's well-being into account when assessing whether coercive measures are to be ordered and, if so, which ones are to be applied.

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

48. The applicants complained that the Supreme Court, in its decision of 15 October 1996 in the enforcement proceedings, had ordered a review of questions which had already been dealt with in the final return order under the Hague Convention and that this review had eventually led to the non-enforcement of the return order. They alleged a violation of Article 8 of the Convention which, as far as material, reads as follows:

“1. Everyone has the right to respect for his private and family life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. The parties' submissions

1. The applicants

49. The applicants contended that the interference with their right to respect for their family life was not justified under the second paragraph of Article 8. They submitted, in particular, that the Supreme Court's decision had been based on an erroneous interpretation of the Hague Convention and had not served a legitimate aim. The interference occasioned by the non-enforcement of the final return order had not been necessary. Rather, as in the *Ignaccolo-Zenide v. Romania* case ([GC], no. 31679/96, ECHR 2000-I), the courts had failed to take all reasonable measures to enforce the return order and the delays caused by them had eventually made the enforcement of the return order impossible. In particular, two and a half months had passed between the Supreme Court's decision of 27 February 1996 and the return of the file to the Graz District Civil Court on 7 May 1996. The applicants also contested that no further enforcement measures could be taken after the mother had appealed against the enforcement order. Moreover, the interference complained of had not corresponded to a pressing social need as the second applicant's mother could have participated in the custody proceedings before the Oakland Circuit Court.

2. The Government

50. The Government conceded that the Supreme Court's decision had constituted an interference with the applicants' right to respect for their family life. However, it had its legal basis in section 19 (1) of the Non-Contentious Proceedings Act and Article 13 (b) of the Hague Convention and served a legitimate aim, namely the child's well-being. As to the necessity of the interference, the Government emphasised that the Hague Convention did not grant an absolute right to obtain the return of an abducted child but gave priority to the child's well-being. Referring to *Nuutinen v. Finland* (no. 32842/96, ECHR 2000-VIII), they pointed out that a State could be obliged at the enforcement stage to review whether a given decision was still in the best interests of the child. Consequently, a review of whether the child's return entailed a grave risk of harm for her within the meaning of Article 13 (b) of the Hague Convention was not to be excluded at that stage. The Government contended that at the time of the Regional

Court's decision of 29 August 1996 and the Supreme Court's decision of 15 October 1996, the Oakland Circuit Court had already awarded the first applicant sole custody without hearing the child's mother and without examining the first applicant's ability to take care of the child. Thus, contrary to the situation obtaining when the return order had been made, it could no longer be expected that the mother's accusations raised against the first applicant would be examined in custody proceedings before the United States' courts.

51. As to the procedural requirements inherent in Article 8, the Government asserted that the first applicant had been sufficiently involved in the decision-making process. He had been represented by counsel throughout the proceedings and had been informed about all the relevant procedural steps and given the opportunity to comment on them. Moreover, there had not been any unnecessary delays in the proceedings. Unlike in the case of *Ignaccolo-Zenide v. Romania*, the return of the child had not been delayed by the inactivity of the courts. The Graz District Civil Court had issued an enforcement order on 8 May 1996, one day after it had received the file with the Supreme Court's final decision on the return order, and an unsuccessful attempt to enforce the order had been made on 10 May 1996. No further attempts could be made as the mother had appealed against the enforcement order. Thereafter, no further enforcement attempts had been made in view of the Graz Regional Court's decision of 29 August 1996 to review the question whether the second applicant's return would entail a grave risk of harm for her. The decisions in the appeal proceedings had followed at reasonable intervals. Finally, the enforcement of the return order had been rejected on the basis of comprehensively considered judicial decisions which had weighed all the interests involved and had given priority to the child's well-being. In so doing, the courts had not exceeded the margin of appreciation afforded to them by Article 8 § 2 of the Convention.

3. *The third parties*

52. The third parties, Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, argued that the present case was similar to the *Ignaccolo-Zenide v. Romania* case. The main question therefore was whether Austria had complied with its positive obligations under Article 8. Consequently, the "all reasonable measures" standard developed in *Ignaccolo-Zenide*, which referred in turn to the standards laid down in the Hague Convention, in particular in its Articles 7 and 11, had to be applied. In their view, the main point in issue in the case was the Austrian courts' failure to enforce the return order in a timely manner. The review of the return order in the enforcement proceedings - which, in their submission, had been contrary to the Hague Convention and the contracting State's

positive obligations under Article 8 - was merely a consequence of this failure and not a justified interference with the applicants' rights under Article 8. In addition, they emphasised that the enforcement of final court orders was generally required by respect for the rule of law.

53. The mother of the second applicant, Mrs Sylvester, also as a third party, agreed with the Government that there was no indication of a violation of Article 8, as the Austrian courts had refused to enforce the return order on the ground that it would entail a grave risk for the child's well-being. Thus, their decisions were in line with the Court's case-law, according to which the State's obligation to reunite a parent with his child is not an absolute one, as the interests of the child's well-being may override the parent's interest in reunion.

B. The Court's assessment

54. The Court notes, firstly, that it was common ground that the tie between the two applicants was one of family life for the purposes of Article 8 of the Convention.

55. That being so, it must be determined whether there has been a failure to respect the applicants' family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Ignaccolo-Zenide*, cited above, § 94; *Nuutinen*, cited above, § 127; *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299, p. 20, § 55).

56. The Court notes at the outset that the present case concerns the non-enforcement of a final return order under the Hague Convention.

57. It is comparable to the above-cited *Ignaccolo-Zenide v. Romania* case, in which the Court found that the positive obligations that Article 8 lays on the Contracting States in the matter of reuniting a parent with his or her child must be interpreted in the light of the Hague Convention, all the more so where the respondent State is also a party to that instrument, Article 7 of which contains a list of measures to be taken by States to secure the prompt return of children (*ibid.*, § 95).

58. More generally, a Contracting State's positive obligations under Article 8 include a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action. However, the national authorities' obligation

to take such measures is not absolute, since the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. Any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (*ibid.*, § 94; see also *Hokkanen*, cited above, § 58; and *Olsson v. Sweden* (no.2), judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90).

59. In cases concerning the enforcement of decisions in the realm of family law, the Court has repeatedly found that what is decisive is whether the national authorities have taken all the necessary steps to facilitate execution as can reasonably be demanded in the special circumstances of each case (see *Hokkanen*, cited above, § 58; *Ignaccolo-Zenide*, cited above, § 96; *Nuutinen*, cited above, § 128). In examining whether non-enforcement of a court order amounted to a lack of respect for the applicants' family life the Court must strike a fair balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law (see *Nuutinen*, cited above, § 129).

60. In cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her. In proceedings under the Hague Convention this is all the more so, as Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously in proceedings for the return of children and any inaction lasting more than six weeks may give rise to a request for a statement of reasons for the delay (see *Ignaccolo-Zenide*, cited above, § 102).

61. The Court notes the Government's argument that there was a change in circumstances after the Supreme Court's decision of 27 February 1996 by which the return order became final, justifying a review in the enforcement proceedings of whether the second applicant's return entailed a grave risk of harm within the meaning of Article 13 (b) of the Hague Convention. They submitted, in particular, that, on 16 April 1996, the Oakland Circuit Court had issued a default judgment of divorce, awarding the first applicant sole custody of the second applicant. In contrast to the situation obtaining when the return order had been made, it could no longer be expected that an examination of the mother's accusations regarding the first applicant's harmful behaviour, namely his allegedly masturbating in the presence of the child, would take place in custody proceedings before the United States' courts.

62. For their part, the third parties Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, considered that to conduct a review under Article 13 (b) of the Hague Convention in the enforcement proceedings was in conflict not only with the aims of the Hague Convention, but also with a Contracting State's positive obligations under Article 8. They emphasised that the enforcement of final court orders was generally required by respect for the rule of law.

63. The Court accepts that a change in the relevant facts may exceptionally justify the non-enforcement of a final return order. However, having regard to the State's positive obligations under Article 8 and the general requirement of respect for the rule of law, the Court must be satisfied that the change of relevant facts was not brought about by the State's failure to take all measures that could reasonably be expected to facilitate execution of the return order.

64. The Court observes that the Graz Regional Civil Court's decision of 29 August 1996 (see paragraphs 29-30 above), setting aside the enforcement order, and the Supreme Court's decision of 15 October 1996 (see paragraphs 32-34 above) do not even mention the change of circumstances now relied on by the Government. That argument cannot, therefore, serve to justify the non-enforcement of the return order.

65. However, the Supreme Court advanced another argument, namely that the courts, when issuing the return order, had denied that there was any risk of psychological harm being caused by the alleged sexual behaviour of the first applicant, exclusively on account of the child's tender age at the time. Therefore, a review of the question whether the second applicant would suffer grave harm in the event of her return required further examination, including the taking of an expert opinion. However, the child psychology expert apparently did not deal with this issue in his opinion prepared in the continued proceedings; nor did the issue play any role in the subsequent decisions. Accordingly, that consideration equally cannot serve to justify the non-enforcement of the return order.

66. The fact remains that the decisions of 29 August and 15 October 1996 relied rather heavily on the lapse of time and the ensuing alienation between the first and second applicants. The Court will therefore examine whether or not this lapse of time was caused by the authorities' failure to take adequate and effective measures for the enforcement of the return order.

67. The Court observes that, while the main proceedings relating to the issuing of the return order were conducted with exemplary speed, as the case came before three instances in just four months, ending with the Supreme Court's decision of 27 February 1996, there is no explanation for the delay of more than two months which occurred before the file was returned from the Supreme Court to the Graz District Court on 7 May 1996.

Moreover, such a delay has to be viewed as an important one, given that under Article 11 of the Hague Convention any inaction of more than six weeks may give rise to a request for a statement of reasons.

68. Admittedly, the District Court immediately ordered the enforcement of the return order. But after the first unsuccessful enforcement attempt on 10 May 1996 no further steps towards enforcement were taken despite the first applicant's request of 18 June 1996. The Government argued that no further enforcement attempts could be made as long as the mother's appeal of 15 May 1996 was pending, while the applicants contested this. The Court is not required to examine which was the position under domestic law, as it is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention (see *Ignaccolo-Zenide*, cited above, § 108). At the very least, the courts were under a particular duty to give an expeditious decision on the appeal in question. Nevertheless, it took three and a half months for the Graz Regional Civil Court to decide, on 29 August 1996, to quash the enforcement order of 8 May and to refer the case back to the District Court.

69. After the Supreme Court's decision of 15 October 1996, which confirmed the setting aside of the enforcement order, it took the District Court more than five months to obtain an opinion from the expert in child psychology, although he was already familiar with the case, as he had participated in the main proceedings. Relying on this expert's opinion, the District Court found on 29 April 1997 that, given the considerable lapse of time, the removal of the second applicant from her main person of reference, namely her mother, would expose her to serious psychological harm, as her father, the first applicant, had in the meantime become a complete stranger to her. The District Court's decision, which was upheld by the Graz Regional Court and, on 9 September 1997, by the Supreme Court, shows that the case was ultimately decided by the time that had elapsed. Without overlooking the difficulties created by the resistance of the second applicant's mother, the Court finds, nevertheless, that the lapse of time was to a large extent caused by the authorities' own handling of the case. In this connection, the Court reiterates that effective respect for family life requires that future relations between parent and child not be determined by the mere effluxion of time (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 65).

70. Moreover, the Court observes that the authorities did not take any measures to create the necessary conditions for executing the return order while the lengthy enforcement proceedings were pending.

71. The Court notes in particular that following the first unsuccessful enforcement attempt of 10 May 1996, the mother of the second applicant apparently changed her whereabouts with the aim of defying the execution of the return order. However, the authorities did not take any steps to locate the second applicant with a view to facilitating contact with the first

applicant. On the contrary, it transpires from the correspondence exchanged from May to December 1996 between the Austrian Ministry of Justice and the United States Department of State that, in the Austrian authorities' view, it fell to the first applicant's counsel to take all necessary steps to obtain the enforcement of the return order. In this connection, the Court points out that it has refuted such a line of argument in *Ignaccolo-Zenide v. Romania*, finding that an applicant's omission cannot absolve the authorities from their obligations in the matter of execution, since it is they who exercise public authority (ibid., § 111).

72. Having regard to the foregoing, the Court concludes that the Austrian authorities failed to take, without delay, all the measures that could reasonably be expected to enforce the return order, and thereby breached the applicants' right to respect for their family life, as guaranteed by Article 8.

Consequently, there has been a violation of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

73. The applicants maintained that the Supreme Court's decision of 15 October 1996 ordering a review of questions which had already been dealt with in the final return order had eventually led to the non-enforcement of the return order. They alleged a violation of Article 6 of the Convention, which, as far as material, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

74. The Government asserted that the courts were obliged in the enforcement proceedings to take the child's well-being into account in accordance with section 19 (1) of the Non-Contentious Proceedings Act. However, Article 6 did not prevent a review of a final court order if there had been a change in the relevant facts.

75. The third parties, Ms Jan Rewers McMillan, the National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children, asserted that the failure to enforce the return order and its reconsideration in the enforcement proceedings raised an issue under Article 6. They referred to *Hornsby v. Greece* (judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-II), in which the Court had held that the execution of a judgment had to be regarded as an integral part of the “trial” for the purposes of Article 6 (ibid., p. 510, § 40).

76. The Court reiterates the difference in the nature of the interests protected by Articles 6 and 8 of the Convention. While Article 6 affords a procedural safeguard, namely the “right to a court” in the determination of one's “civil rights and obligations”, Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. The difference between the purpose pursued by the respective safeguards afforded by Articles 6 and

8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see for instance *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91).

77. In the instant case, the Court finds that the lack of respect for the applicants' family life resulting from the non-enforcement of the final return order is at the heart of their complaint. Having regard to its above findings under Article 8, which focus on the non-enforcement of a final court order, the Court considers that it is not necessary to examine the facts also under Article 6.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

79. The first applicant requested a total amount of 276,461.58 United States dollars (USD) equivalent to 278,021 euros (EUR). [Nota: On 2 December 2002, the date on which the claims were submitted.] in respect of pecuniary damage, broken down as follows:

(i) USD 31,033.54 for travel costs and related car rental, taxi and hotel costs for sixteen trips between Michigan and Graz from December 1995 to September 2002 in connection with the enforcement proceedings and subsequently for the purpose of obtaining contact with or access to the second applicant.

This sum includes USD 4,228.92 for travel and subsistence costs relating to a trip to Graz between 17 and 30 December 1995, USD 3,310.74 for travel and subsistence costs relating to a trip to Graz between 8 and 11 May 1996 and USD 2,667.56 for travel and subsistence costs relating to a trip to Graz between 31 May and 8 June 1997. The remainder relates to thirteen trips to Graz undertaken after the termination of the enforcement proceedings in September 1997.

(ii) USD 500 for the costs of assistance from an interpreter in an interview with a court-appointed expert in June 1999 in the context of access proceedings;

(iii) USD 181,901.04 for lost wages following the loss of his job in June 2001 allegedly as a result of the time and attention spent pursuing the Hague Convention proceedings and the ensuing custody and access proceedings in Austria;

(iv) USD 2,000 for the costs of supervision of access visits to the second applicant in June and December 1997;

(v) USD 41,328 for payments made to Mrs Sylvester allegedly to obtain her agreement to supervised access visits since July 1999;

(vi) USD 19,699 for the costs of psychological counselling and medical treatment relating to emotional and physical difficulties allegedly suffered as a result of the Austrian authorities' failure to enforce the return order.

The first applicant conceded that some or all of the above losses could also be examined under the head of costs and expenses.

80. As to non-pecuniary damages the first applicant requested an award of USD 1 million on his own behalf as compensation for the anger, anxiety, humiliation and frustration suffered as a result of the non-enforcement of the return order. He emphasised that the loss of having a life with his daughter was priceless. However, he suffered - to an extent affecting his physical and emotional health - as a result of the fact that he had effectively been prevented, by the second applicant's mother and the Austrian authorities, from playing any significant role in his daughter's life. Further, he claimed USD 2 million on behalf of the second applicant for her being deprived of her father and of any family life with her paternal family in the United States.

81. The Government contended that the first applicant's claims for pecuniary damage were excessive. In any case, as far as they related to the exercise of his access rights (travel costs, alleged payments to Mrs Sylvester, costs for supervision, interpreters' costs), the alleged damage did not have any causal link with the breach of the Convention at issue. The same applied to other items, such as lost wages and costs of medical treatment. As far as the travel and subsistence costs related to the Hague Convention proceedings, which was only the case for a minor part of them, their necessity had not always been convincingly established (for instance the need to use a taxi instead of public transport).

82. As to non-pecuniary damage, the Government also contended that the sums claimed were excessive and disregarded the Court's case-law in comparable cases. As regards non-pecuniary damage claimed on behalf of the second applicant, the Government contested that there was any causal link with the breach of the Convention at issue. Had the violation of the Convention not taken place, the second applicant would equally suffer by being separated from her mother and her maternal family.

83. As to pecuniary damage, the Court finds that there is no causal link between the damage claimed and the violation found, with the exception of travel and subsistence costs related to the enforcement of the return order under the Hague Convention. As regards the said travel and subsistence costs, the Court considers it appropriate to deal with them under the head of costs and expenses.

84. As to non-pecuniary damage, the Court sees no reason to doubt that the first applicant suffered distress as a result of the non-enforcement of the return order and that sufficient just satisfaction would not be provided solely by the finding of a violation. Having regard to the sums awarded in comparable cases (see, for instance, *Ignaccolo-Zenide*, cited above, §117, *Hokkanen*, cited above, p. 27, § 77; see also, *mutatis mutandis*, *Elsholz v. Germany* [GC], no. 25735/94, § 71, ECHR 2000-VIII and *Kutzner v. Germany*, no. 46544/99, § 87, ECHR 2002-I) and making an assessment on an equitable basis as required by Article 41, the Court awards the first applicant EUR 20,000. As to the second applicant, the Court considers that the finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the non-enforcement of the return order.

85. In sum, the Court therefore awards the first applicant EUR 20,000 under the head of non-pecuniary damage.

B. Costs and expenses

86. The first applicant requested a total amount of EUR 288,419.72 under the head of costs and expenses broken down as follows

(i) USD 146,689.14, equivalent to EUR 147,517, for legal expenses paid to two United States law firms which advised him on matters relating to the Hague Convention proceedings and subsequent proceedings;

(ii) EUR 127,553.13 for costs of the Hague Convention proceedings and subsequent proceedings in Austria and of the Convention proceedings;

(iii) USD 3,556.37 equivalent to EUR 3,576.43 for telephone and postal costs;

(iv) USD 9,718.33 equivalent to EUR 9,773.16 for costs of a hearing in the United States Congress concerning the workings of the Hague Convention.

87. As to the costs of the domestic proceedings, the Government asserted, firstly, that the basis for their assessment was not in accordance with the Lawyers' Fees Act (*Rechtsanwaltstarifgesetz*). Secondly, they submitted that the bill of fees contained a number of unspecified items and numerous costs incurred after the termination, in September 1997, of the Hague Convention proceedings at stake in the instant case, costs which had probably been incurred in other sets of proceedings relating to access, custody or maintenance issues. Thirdly, the first applicant had failed to show to what extent the costs had been necessarily incurred to prevent the breach of the Convention at issue.

88. According to the Court's consistent case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be

shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, for instance, *Venema v. the Netherlands*, no. 35731/97, § 117, to be published in ECHR 2002).

89. The Court considers that the costs and expenses relating to the domestic proceedings, as far as they concern the enforcement proceedings found to cause a violation of the Convention (see paragraph 72 above) and the costs of the Strasbourg proceedings were incurred necessarily. They must, accordingly, be reimbursed in so far as they do not exceed a reasonable level (see *Ignaccolo-Zenide v. Romania*, cited above, § 121).

90. The Court finds that the costs claimed are excessive. Making an assessment on an equitable basis and considering, in particular, that the case was indisputably complex, it awards the first applicant EUR 20,000 for legal costs and expenses.

91. The Court now turns to travel and subsistence costs related to the enforcement of the return order under the Hague Convention. It notes that only two of the sixteen trips listed by the first applicant were undertaken during the enforcement proceedings. The first one from 8 to 10 May 1996 and the second one from 31 May to 8 June 1997. The Court finds that only the costs relating to the latter can be regarded as having been incurred in order to seek prevention or rectification of the violation of the Convention found, as the first one was apparently related to the one and only enforcement attempt, which would also have taken place had the violation of the Convention not occurred. The Court, therefore, grants compensation for the costs of this trip, which amount to USD 2,667.56, equivalent to EUR 2,682.61.

92. In sum, the Court awards the first applicant EUR 22,682.61 under the head of costs and expenses.

C. Default interest

93. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;
2. *Holds* unanimously that there is no need to rule on the complaint under Article 6 of the Convention;

3. *Holds* unanimously
 - (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 22,682.61 (twenty-two thousand six hundred and eighty-two euros sixty-one cents) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Holds* by 4 votes to 3 that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the second applicant;
5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 April 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint partly dissenting opinion of Mr Bonello, Mrs Tulkens and Mrs Vajic;
- (b) separate opinion of Mr Bonello.

C. R.
S. N.

**JOINT PARTLY DISSENTING OPINION OF
JUDGES BONELLO, TULKENS AND VAJIC**

(Translation)

As regards the non-pecuniary damage sustained by the second applicant, the Court holds: “The finding of a violation provides sufficient just satisfaction for any non-pecuniary damage she may have suffered as a result of the non-enforcement of the return order” (see paragraph 84, *in fine*, of the judgment). However, in like circumstances, it awards the first applicant 20,000 euros for non-pecuniary damage (*ibid.*). The imbalance between the two awards does not appear to us to be justified, especially as the fundamental aim of the Hague Convention with which the present case is concerned is to protect children (see paragraph 44 of the judgment). Although a finding of a violation may in certain cases take on a symbolic value, in the present instance it amounts to reparation at its most frugal.

Personally, we do not share the view that, owing to its tender age, the child has not suffered or may not in the future suffer any non-pecuniary damage (such as stress or anxiety) of its own, warranting an award of compensation for the violation of Article 8 of the Convention which the Court has found as a result of the Austrian authorities' failure to take, without delay, the measures they could reasonably have been expected to take in order to enforce the return order, in breach of the second applicant's right to respect for her family life (see paragraph 72 of the judgment).

We consider that, as in the *Scozzari and Giunta v. Italy* judgment of 13 July 2000, in which the Court held that it had to take into account the non-pecuniary damage sustained by the children in view of their position as applicants (§ 253), the Court should have granted the second applicant, whose conduct cannot be criticised in any way, compensation reflecting the level of damage she sustained.

SEPARATE OPINION OF JUDGE BONELLO

1. The majority's ruling as to what just satisfaction to award the applicant and his minor daughter Carina Maria, to redress the ascertained violation of their fundamental right to the enjoyment of family life, finds me in radical disagreement. I am participating in the joint dissent disputing the majority's decision to award nothing to Carina Maria in so far as, in their view, the mere finding of a violation constitutes in itself sufficient just satisfaction for moral damages suffered by her. I have now to clarify my views concerning the damages and costs awarded to the applicant personally.

2. I voted with the Court on the amounts liquidated in favour of the applicant as material and moral damages and as costs and expenses. I did so not because I endorse the majority's reasoning and its mathematical outcome, but lest my negative vote be read as implying that, according to me, no damages or costs at all were due. On the contrary, I consider the amounts granted in favour of the applicant as mean and beggarly. I believe that the compensation awarded conspicuously fails the test of proportionality between the harm inflicted and the redress afforded.

3. The applicant's existence was skilfully and organically disrupted by the Austrian authorities' defiance of their responsibilities under Article 8 of the Convention - which, as the majority agreed, in the present case imposed on them a duty to ensure the enforcement of the final return order issued in his favour in terms of the Hague Convention on the Civil Aspects of International Child Abduction. The applicant and his wife had established the matrimonial residence in Michigan, USA. The wife's relocation to Austria, together with the illicitly appropriated child, coerced the applicant into instituting legal proceedings in Austria, which necessitated his presence there to ensure their diligent and successful prosecution.

4. The Court has identified two main sources of violation of the guarantees of Article 8 by the Austrian tribunals: some 'unexplainable delays' in the progress of the proceedings (para. 67) and the fact that they negated the final return order previously issued in favour of the applicant. I believe that, in accordance with the Court's case law, all the losses, costs and expenses "actually and necessarily" incurred by the applicant for the prevention or rectification of a violation of the Convention, ought to have been reimbursed to the victim of that infringement.

5. I would, of course, exclude from the liquidation of damages, costs and expenses, those the applicant incurred to counteract the actions of his wife at a time when the liability of the Austrian state had not yet been engaged.

Before that instant, nothing is due by Austria. But, as from then on, the unreasonable delays and the resistance to the enforcement of the final return order (for both of which the majority found the Austrian courts responsible) played a determining conjoint role in infringing the applicant's Convention rights. This cut-off point, after which the applicant was no longer battling his wife but was contending with the failures of the Austrian system, occurred in April 1996. It is my view that, from this moment when the state's responsibility was fully engaged, all losses, damages costs and expenses incurred by the applicant to redress the ongoing state of infringement, clearly became the liability of the respondent state.

6. If, in June 2001 the applicant lost his job in the USA, as the diligent prosecution of the proceedings in Austria prevented the diligent prosecution of his work responsibilities in the USA, then this loss too falls to be compensated. The Court considered that there is no causal link between the material damages claimed and the violation found (para. 83). In my view, the bond of causality between the efforts put in by the applicant to obtain redress for the infringement suffered, on the one hand, and the loss of his job (and various other substantial damages), on the other, is as compelling as it is overwhelming. To believe otherwise is also to believe that the applicant could have carried on working industriously in the USA, while engaging in a full-time legal affray in Austria, continually crossing the globe to attend court sittings and conferences with his lawyers thousands of kilometres away. Not one euro's worth of material damages was recognised and awarded to the applicant by the majority, under any head whatsoever.

7. The liquidation of 20,000 euros to the applicant as moral damages for pain and suffering, I consider paltry and uncaring. To a person who has had the core of his existence irretrievably gutted by the violation of fundamental rights, to a father who has been irrevocably barred from the covenant with his only daughter, to a victim of atrocity born of the distressed use of the law against him, the majority responded with the award of what, in my view, amounts to an almost offensive trifle. That is hardly the most eloquent idiom to underscore how hallowed the sanctity of fundamental rights is in the eyes of the Court. If neutralizing the Convention comes so cheap, states may well find it foolish not to have a brave try.

Family Abduction

Carina Sylvester



Birth: 09/11/1994 **Race:** White
Missing: 10/30/1995 **Ht:** 4'03" **Wt:** 70 lbs
Eyes: Brown **Hair:** Brown **Sex:** Female
Missing From: West Bloomfield, MI
Age Now 9 Yrs United States



Monika Sylvester



Abductor

Birth 04/29/1962 **Race:** White
Ht: 5'08" **Wt** 150 lbs **Sex:** Female
Eyes: Brown **Hair:** Brown

An updated photograph of Carina, from April 2004, is shown on the left and a photograph of Carina at the time of her abduction is shown in the middle. Carina's height and weight are approximations. She was abducted by her non-custodial mother, Monika Maria Sylvester. An International Parental Kidnapping warrant was issued for the abductor on May 29, 1996. Carina has both American and Austrian citizenship. The abductor may be using the alias last name Rossmann. The abductor has a prominent mole on her chin.



ANYONE HAVING INFORMATION SHOULD CONTACT

The National Center for Missing and Exploited Children

1-800-843-5678 (1-800-THE-LOST) OR

Federal Bureau of Investigation (Troy, Michigan) 1-248-879-6090

Or Your Local FBI